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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner

v.

JOSEPH M. FIELD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Golden Triangle Broadcasting, Inc. petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the Commonwealth of Pennsylvania (App. A, *infra*) is reported at 451 Pa. 410. The Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division (App. D, *infra*) and that court's *en banc* Opinion and Final Decree (App. E, *infra*) are unreported.

JURISDICTION

The judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on May 4, 1973 (App. A, *infra*). A timely Petition for Reargument (App. B, *infra*) was denied *Per Curiam*, without opinion, on June 20, 1973 (App. C, *infra*).

On September 12, 1973, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 17, 1973

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania, in ordering the transfer at cost by petitioner to respondent of a 50,000 watt radio facility, exceeds its jurisdiction and deprives petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States where, throughout the entire proceeding, neither the question of transfer of the 50,000 watt radio facility nor the price therefor were in issue or the subject of a hearing since both parties agreed that respondent had no right to that facility?

2. Whether the said order by the Supreme Court of Pennsylvania, which was based upon a holding that action required by Federal law to be taken by the petitioner as the holder of a radio station construction permit constituted "questionable conduct", violates the

supremacy clause of the Constitution of the United States and deprives petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by imposing a conflicting state standard of conduct?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved, being lengthy, are set forth in Appendix G, *infra*. They are:

Section 1 of the Fourteenth Amendment to the Constitution of the United States (U.S. Const., Amend. XIV, Section 1).

Clause 2 of Article VI of the Constitution of the United States (U.S. Const., Art. VI, cl.2).

Section 319(b) of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. §319(b)).

Section 151 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. §151).

STATEMENT

This suit was brought by Joseph M. Field ("respondent") on December 13, 1968 against Golden Triangle Broadcasting, Inc. ("petitioner")[1] seeking specific performance of a letter memorandum dated August 14, 1968 relating to the purchase by respondent from petitioner of Station WEEP, a 1,000 watt AM radio transmitting facility, and Station WEEP-FM, both situated in Pittsburgh, Pennsylvania, together with other assets relating to the operation of those stations (hereinafter referred to collectively as the "1,000 watt facility"). (R. 9a)[2] Throughout the litigation, petitioner was of the position that the letter memorandum was but a prelude to an agreement and was not enforceable. The trial court ruled otherwise, which ruling was affirmed by the Supreme Court of Pennsylvania, and said determination as to the existence of a contract, being strictly a matter of state law, is not before this Court.

The letter, in addition to the 1,000 watt facility, involved a 50,000 watt Construction Permit which had been issued to petitioner by the Federal Communications Commission ("Commission") on March 15, 1967 for petitioner to construct a new facility, utilizing a 50,000 watt transmitter, to be located in Hampton Township, Pennsylvania, approximately ten miles north of the City of Pittsburgh. The letter provided, *inter alia*, that if petitioner did not deliver the 50,000 watt Construction Per-

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1. The suit was brought in the Court of Common Pleas of Allegheny County, Pennsylvania.

2. "R." refers to the printed Record filed in the Supreme Court of Pennsylvania.

mit to respondent, the purchase price would be reduced by a specified amount.

During pendency of the litigation, construction of the new 50,000 watt facility was completed by petitioner. The 1,000 watt facility provided a circular signal contour with a strength of .5mv/m (F.C.C. protected contour) over the southwest corner of the Commonwealth of Pennsylvania and approximately three miles into the State of West Virginia. In contrast, the new 50,000 watt facility places a .5 mv/m signal, in a generally elliptical fashion, over greatly expanded areas of Pennsylvania and West Virginia, and portions of the States of Ohio and Maryland. (App. H, *infra*).

Upon completion of construction of the 50,000 watt facility, petitioner applied to the Commission for Program Test (i.e., Operating) Authority and license. Respondent appeared and opposed such grant on the ground that his rights might be adversely affected in the proceeding pending in the Pennsylvania state courts. By *Memorandum Opinion and Order,* (App. F, *infra.*) the Commission dismissed this contention and, in doing so, determined that the issuance of the 50,000 watt Construction Permit to petitioner was based upon a finding that the construction and operation of the 50,000 watt facility would serve the public interest, convenience and necessity and, moreover, that once the permit was issued, *petitioner was under an obligation to construct the facility in a diligent manner.* (App. F, *infra,* p. 58a)

During the trial of the instant case, the trial court refused to accept evidence relating to the 50,000 watt facility on the basis that that facility was not in issue and that the facts surrounding its construction were not

related to the action for specific performance of the letter relating to the 1,000 watt facility. (R. 337a-349a).

This conclusion of the trial court was consistent with the position taken by both parties, throughout the proceedings, that the possible inclusion of the 50,000 watt facility in the decree of specific performance was not in issue. Indeed, respondent stated to the trial court that he was not entitled to the 50,000 watt facility. Thus, in a reply brief filed by respondent in that court, respondent included an argument that was entitled: "*IV. The Parties Agree that the 50 kw Facility is Not Included*".

In the first paragraph of that argument, respondent made the following statement:

> "Both parties agree that the 50 kw facility constructed by [petitioner] after this litigation commenced should not be included in any decree of specific performance. *[Respondent] stated that it did not want the facility.* [Petitioner] argued that [respondent] should not be 'enriched' by receiving it . *There is no dispute here.*" (Emphasis supplied.)

This clear position of the parties was incorporated in the adjudication of the trial court, as follows:

> "Both parties agree that this new facility, not in existence on August 14, 1968, should not be included in any decree of specific performance and, accordingly, it will not be included." (App. D, *infra*, p. 48a).

The trial court found, against the position of petitioner, that the August 14, 1968 letter constituted a binding agreement. However, in accordance with the position of both parties as stated above, the decree nisi

and final decree entered by the trial court expressly excluded the 50,000 watt facility. (App. D and App. E, pp. 50a and 54a, *infra*).

Petitioner filed an appeal from the final decree to the Supreme Court of Pennsylvania, but respondent did not take an appeal. Again, respondent, made it clear to the Pennsylvania Supreme Court that the transfer of the 50,000 watt facility was not in issue and that he was not entitled to receive it. Thus, respondent stated in his brief as follows:

> "Finally, [petitioner] claims that specific performance should not be granted because since this litigation commenced, [petitioner] has constructed a 50 kw facility which, when the agreement was signed, was the subject only of a construction permit. *Both parties agree that [respondent] is not entitled to receive the newly constructed facility.*" (Emphasis added.)

Accordingly, throughout this entire proceeding there was never an issue or question raised as to whether petitioner was under any obligation to transfer the 50,000 watt facility to respondent. Further, none of the myriad other issues and contentions were litigated, which would have arisen, had an issue with respect to the transfer of the 50,000 watt facility been involved.

The transfer of the 50,000 watt facility first arose in this litigation when the Supreme Court of Pennsylvania in its opinion of May 4, 1973 concluded that it would "not refuse specific performance against a party who, by its own questionable conduct has attempted to make performance of the contract impossible" (App. A,

infra, p. 17a). Based upon this statement, the Pennsylvania Supreme Court proceeded to modify the trial court's decree to order that petitioner transfer the 50,000 watt facility to respondent, conditioned only upon payment by respondent of petitioner's cost of the facility.

Inasmuch as the possible transfer of the 50,000 watt facility was never in issue, the Pennsylvania Supreme Court's decision constituted an adjudication of a matter not before it and, moreover, as to which petitioner was never afforded a hearing. Furthermore, the construction of the 50,000 watt facility during the pendency of the litigation, which had been expressly found by the Commission to be an obligation of petitioner under Federal law, served as the sole basis for the Pennsylvania Supreme Court's conclusion that such construction constituted "questionable conduct" which subjected petitioner to the penalties of being required to convey that facility to respondent and only at cost.

On May 14, 1973, petitioner filed a Petition for Reargument (App. B, *infra*) with the Supreme Court of Pennsylvania in which it raised, *inter alia,* the issues of (1) the denial of due process of law to petitioner under the Fourteenth Amendment to the Constitution of the United States occasioned by the Court's adjudication of a matter not in issue and, therefore, as to which petitioner had not been afforded a hearing, and (2) the Federal supremacy question arising from the determination by the Commission that petitioner's construction of the 50,000 watt facility, which the Pennsylvania Supreme Court held was "questionable conduct", was pursuant to an obligation of petitioner under Federal law.

Statement.

On June 20, 1973, without hearing or argument, petitioner's Petition for Reargument was denied by the Pennsylvania Supreme Court (App. C, *infra*). The federal questions raised by said Petition for Reargument were properly and timely raised since they first arose only upon the handing down of the judgment of the Supreme Court of Pennsylvania on May 4, 1973, and upon denial of the Petition for Reargument the said judgment is subject to review by this court. *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673 (1930); *Missouri v. Gehner,* 281 U.S. 313 (1930); *Saunders v. Shaw,* 244 U.S. 317 (1917).

On July 6, 1973, petitioner filed with the Supreme Court of Pennsylvania a Petition to Correct Judgment to Conform to the Facts appearing of Record which has not yet been ruled upon by that Court, and which has not, therefore, commenced a new period within which a petition for certiorari might be filed.

On September 12, 1973, Mr. Justice Brennan extended the time for filing a petition for writ of certiorari to November 17, 1973, and as no further extensions of time are permitted, 62 Stat. 961, 28 U.S.C. §2101(c), as amended, this petition is now timely.

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Deprives Petitioner of Its Property Without a Hearing in Violation of Due Process of Law Under the Fourteenth Amendment and Is in Conflict With Decisions of This Court.

The judgment of the Supreme Court of Pennsylvania has ordered the transfer of the 50,000 watt facility owned by petitioner to respondent, conditioned only upon the payment of petitioner's cost of the facility. This action was taken despite the fact that respondent, at no time prior to the judgment of the Supreme Court of Pennsylvania, claimed any right to that facility. On the contrary both parties agreed and the trial court held that its ownership was not in issue and that the facility was not to be transferred.

This action of the Supreme Court of Pennsylvania was taken without petitioner being afforded any opportunity to be heard on the matter and, therefore, is in direct conflict with numerous applicable decisions of this Court.

This Court has stated on numerous occasions that a fundamental principle of justice and due process of law is that a person may not be deprived of his property unless his right to that property has been drawn into question or issue before the court *and* he has had notice and an opportunity to protect his property in a meaningful hearing.

For example, the case of *Coe v. Armour Fertilizer Works,* 237 U.S. 413 (1915) involved the attachment of a corporate shareholder's property in execution on a

corporate debt without a prior hearing under a Florida statutory procedure. It was contended before this Court that due process of law was satisfied by the shareholder's appearance in the court below to contest the constitutionality of the procedure. Of this situation, this Court said:

> "* * * before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing * * *" (237 U.S. at page 423)
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> * * *
>
> "But, it is said, * * * he in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits." (237 U.S. at page 424)
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> * * *
>
> "For in this case there was no pending action or issue; plaintiff in error came into court to object,

on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition, which simply raised an issue of law under the state constitution and the Fourteenth Amendment into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. *In doing this, the court in effect rendered judgment against him upon matter that was not within the pleadings and was not in fact litigated. To do this, without his consent — and the record shows no consent — is contrary to fundamental principles of justice. Reynolds v. Stockton,* 140 U.S. 254, 268, 269." (237 U.S. at page 426, emphasis added)

The case of *Reynolds v. Stockton,* 140 U.S. 254 (1891) cited by this Court in *Coe, supra,* while involving the "full faith and credit" clause of Section 1 of Article IV of the United States Constitution, clearly illustrates the fundamental propositions stated in *Coe, supra.* In *Reynolds, supra,* the complaint raised a question of entitlement as to a particular trust fund, and the judgment granted was broader, being a money recovery against the defendant. In its discussion, this Court posed a question as to whether, in an action in replevin for possession of personalty, a judgment for possession of real estate could be upheld where the pleadings were not amended and the issues relating to the real estate were not in fact litigated, and said:

"* * * without amendment of the pleadings, a judgment for the recovery of the possession of real es-

tate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that *a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted.*" (140 U.S. at 265-66, emphasis added.)

This Court went on to quote with approval from an opinion of a New Jersey Court of Errors and Appeals, as follows:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. *It is impossible to concede that because A and B are parties to a suit, a court can decide*

> *any matter in which they are interested, whether such matter be involved in the pending litigation or not.* Persons by becoming suitors do not place themselves for all purposes under the control of the court, and *it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises."* (140 U.S. at 268, emphasis added.)

In the instant case, the Supreme Court of Pennsylvania has taken unto itself the power to transfer ownership of the 50,000 watt facility to respondent where its ownership was never in issue and was not litigated between the parties, but, on the contrary, was expressly excluded from the litigation by the parties and the trial court. This action by the Supreme Court of Pennsylvania conflicts with the fundamental principles elucidated by this court in the *Reynolds* and *Coe* cases, *supra.*

In addition to the basic requirement that an issue be properly raised before a court may pass on it, the person whose property is being taken or given over to another must have an opportunity to contest the action and to protect his rights. Thus, this Court has variously stated:

> "A fundamental requirement of due process is 'the opportunity to be heard'. *Grannis v. Ordean,* 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)

* * *

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, — whether it has had an opportunity to present its case and be heard in its support * * * a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 681-82 (1930)
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> * * *
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> "* * * the Court has traditionally insisted that whatever its form, opportunity for * * * [a] hearing must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972), *reh. den.* 409 U.S. 902 (1972)

In the instant case, since the issue of ownership of the 50,000 watt facility was never raised prior to the judgment of the Supreme Court of Pennsylvania, it is obvious that there could be, and was, no hearing whatsoever with regard to its ownership.

The judgment of the Pennsylvania Supreme Court, in addition to the above described violations of due process, arbitrarily, and without any hearing, set the price at which petitioner was to sell that property, namely, at petitioner's cost. Not only was the transfer of the 50,000 watt facility improperly ordered, but petitioner also has had no hearing as to the standard of compensation it should receive for that property. It is clear, under the cases hereinabove cited, that a hearing on the amount of petitioner's costs, as ordered by the Supreme Court of Pennsylvania, can in no way

satisfy the requirements of due process, since petitioner has not been heard on the initial question of whether the price of its facility should be cost, fair market value or some other "price."

Thus, as shown above, petitioner has been deprived of its property without due process of law by the order to transfer the 50,000 watt facility to respondent, without any hearing on the propriety of such transfer or the "price" at which it should occur, and without consideration of the myriad issues (including the appropriateness of the remedy of specific performance) and extensive evidence which would have been relevant had the transfer of that facility ever been placed in issue before the Pennsylvania courts.

II. The Judgment of the Supreme Court of Pennsylvania Conflicts With the Federal Communications Act and Therefore Violates the Supremacy Clause of the United States Constitution and Deprives Petitioner of Due Process of Law by Establishing a Dual Set of Conflicting Standards by Which It Is Bound.

The judgment of the Supreme Court of Pennsylvania, ordering the transfer, without hearing, of the 50-000 watt facility resulted from its determination that petitioner engaged in "questionable conduct" by "unilaterally creating an expensive facility not covered by the agreement" (App. A, p. 17a, *infra*). The judgment thus penalizes petitioner for an action which the Commission has previously determined was its obligation under federal law. Thus, the Court has set itself at variance with the Commission and petitioner is caught in the middle.

The case presents the questions of whether the State's common law may constitutionally conflict with the requirements of a federal agency under the Supremacy Clause of the Constitution and whether one person may constitutionally be subjected to mutually exclusive federal and state standards of conduct.

THE NATIONAL POLICY

Speaking of construction permits, Section 319(b) of the Communications Act of 1934, as amended, provides that they shall include a latest date on which operation of the station is expected to begin. Pursuant to the Communications Act, the Commission imposed a deadline for completion of construction of November 15, 1967. The permit itself recited:

> "This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow unless completion of the station is prevented by causes not under the control of the permittee. See Section 1.598 of the Commission Rules."

The Federal Communications Commission was established by Congress to regulate:

> "* * * communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *" 47 U.S.C. §151.

Pursuant to the aformentioned Section it is only the Commission "which shall execute and enforce the provisions" of the Communications Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968).

Prior to the Commission's determination that petitioner was under an obligation to diligently construct its 50,000 watt facility, the Commission, in amending its Rules with respect to new stations, quoted Section 319(b) of the Communications Act and established the National Policy as follows:

> "The policy considerations underlying the permittee's obligation to complete construction in a diligent manner have taken on new meaning in many of the larger and medium markets, where no additional AM, FM or TV channels are available for assignment. In these circumstances, failure to construct promptly and extension of a CP may be detrimental to the listening public and other prospective applicants. If so, this situation cannot be tolerated, for it is contrary to the public interest, convenience, and necessity." *In the Matter of Amendment of Section 1.598 of the Commission's Rules*, 23 F.C.C. 2d 274, 276 (1970).

THE CONFLICTING PENNSYLVANIA POLICY

The Pennsylvania Supreme Court has here established and applied as a principle of equity that a federal radio licensee in possession of a Construction Permit issued by the Commission which proceeds to construct pursuant to said permit, during the pendency of an action for specific performance in the state court, engages in "questionable conduct" which subjects it to the penal-

ties imposed upon petitioner in this case. The Pennsylvania court did not acknowledge the existence of the Commission's determination that Petitioner was *under an obligation* (App. F, p. 58a, *infra*) to construct its authorized 50,000 watt transmission facility. The court recognized that the 50,000 watt facility was "not covered by the agreement" (App. A, p. 17a, *infra*) but ordered its transfer nonetheless because the action of Petitioner in constructing that facility was not in compliance with the principles of equity extant in Pennsylvania.

THE SUPREMACY OF THE NATIONAL POLICY

There is clearly a conflict between (1) the national policy embodied in the Communications Act of 1934 as implemented by the Commission, which requires the expeditious construction of facilities that have been authorized upon the finding by the Commission of enhancement of the public interest, convenience and necessity, and (2) the Pennsylvania policy of penalizing a person for not delaying construction of radio facilities until full adjudication in the Pennsylvania courts is reached. The policy of Pennsylvania must yield to the policy of the United States.

The command of Article VI clearly establishes that the Justices of the Pennsylvania Supreme Court should have been bound in their determination of the rights of the parties before them by the Communications Act as enforced by the Commission. Article VI, Clause 2 of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Only the Commission may regulate the construction of Petitioner's 50,000 watt facility. The Communications Act makes clear that the Commission has occupied the field of radio regulation. "Because the standard set by the [Interstate Commerce] Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Napier v. Atlantic Coast Line RR,* 272 U.S. 605, 613 (1926).

To accept the Pennsylvania court's limitation on construction would have been *to deny the services of Station WEEP to more than 1.1 million people* in over seven thousand square miles of new territory in Pennsylvania, West Virginia, Ohio and Maryland. As the Court stated in *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960) a state may not constitutionally impose any kind of a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Id.* at 444, accord, *Bibb v. Navajo Freight Lines,* 359 U.S. 520 (1959). The adjudication by the Commission that construction was required to have been commenced in fulfillment of the public interest should have ended the matter and the Supreme Court of Pennsylvania should have accepted and abided by that determination.

Reasons for Granting the Writ.

Certiorari should be granted to consider whether the Pennsylvania Supreme Court's use of its common law is compatible with the federal Communications Act. The Communications Act and the Commission's policy fix the obligation attaching to construction of federally regulated radio facilities and this law is the supreme law of the land. "When state law touches upon the area of these federal [patent and copyright] statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). The judgment of the Pennsylvania Supreme Court encroaches directly upon the federal communications law and must not be permitted to stand. *Id.* at 231.

THE IMPOSITION OF CONFLICTING STANDARDS OF CONDUCT DEPRIVED PETITIONER OF DUE PROCESS OF LAW

The opinion of the Supreme Court of Pennsylvania makes quite clear the 50,000 watt facility was not included in the August 14, 1968 letter memorandum, but orders the conveyance of that facility in any event due to petitioner's "unilateral" and "questionable" action. That court also acknowledged that the facility was expensive. Indeed, it is petitioner's principal physical asset, including over 20 acres of land, 4 radio towers, a 50 kilowatt transmitter, microwave equipment with receiving and transmitting capability and myriad other elaborate electronic equipment. Clearly, petitioner is being deprived of various substantial property. The deprivation is unconstitutional because, *inter alia,* it results from the imposition of a standard of conduct in conflict with the federal standard.

As the Pennsylvania judgment now stands, petitioner would have lost no matter what course of action was chosen. To have failed to construct would have resulted in the forfeiture of the construction permit, as litigation in the courts is not a sufficient reason to have extended the life of a construction permit. *Gross Broadcasting Co.*, 26 F.C.C. 2d 306, 310-11 (1970) *modified on other grounds*, 27 F.C.C. 2d 957, *rev'd on other grounds*, 31 F.C.C. 2d 226 (1971). To have constructed, as it did, petitioner is now faced with the loss of its new facility.

A person is entitled to have his conduct judged by one standard and that standard must fairly apprise him of what is required. Indeed, statutes are frequently struck down as constitutionally void for vagueness. *E.g. Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). *A fortiori*, the establishment of conflicting standards of conduct is violative of constitutional requirements of due process.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOSEPH M. FIELD, Appellee, v. GOLDEN TRIANGLE BROADCASTING, INC., Appellant.	No. 100 March Term, 1972

Appeal from the Final Decree of the Court of Common Pleas of Allegheny County at No. 1388 January Term, 1969.

(Reported in 451 Pa. 410)

Argued September 28, 1972. Before Jones, C.J. Eagen, O'Brien, Roberts, Pomeroy, Nix and Manderino, JJ. Filed May 4, 1973.

OPINION BY MR. JUSTICE NIX.

The main issue in this appeal is whether an August 14, 1968 letter agreement, executed by the appellee, Joseph M. Field, and by Myron Jones as President and virtually sole stockholder of the appellant, Golden Triangle Broadcasting, Inc., is an enforceable contract. Appellant contends that even though the writing involved is in form an offer and acceptance, its qualifying words are such that it can be construed merely as an arrangement of terms in contemplation of the parties future agreement on a formal contract.

The facts as found by the chancellor and approved by the court en banc insofar as they are relevant to this appeal are as follows: Appellee is an individual residing

in the City of Philadelphia and appellant, Golden Triangle Broadcasting, Inc. [hereinafter cited as Triangle], is a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania. Triangle is a closely held corporation, whose assets consist solely of radio stations WEEP and WEEP-FM in Pittsburgh, Pennsylvania. Myron Jones is, and at all relevant times has been, the president and chief executive officer of Triangle and is the owner of 597 of its 600 authorized and outstanding shares.

During the first half of 1968, appellant, through Jones, was endeavoring to find a satisfactory purchaser for its radio stations and had negotiated with various possible purchasers including appellee Field, through Blackburn & Co., a media broker in Washington, D.C. On or about August 14, 1968, Jack Harvey of Blackburn & Co. arranged a meeting between Field and Jones in Pittsburgh for the evening of August 14, 1968. In advance of the meeting, Harvey prepared a typewritten letter agreement dated August 14, 1968, which he brought with him to the meeting. At the meeting the purchase of radio stations WEEP and WEEP-FM by Field was discussed and during this discussion, various pen and ink changes were made by Harvey in the text of the typewritten letter agreement and the changes were initialled by Field and Jones. In the early morning hours of August 15, 1968, the parties visited the facilities of the radio stations and after viewing the premises, Field signed the letter and Jones signed the acceptance for the appellant.

On August 15, 1968, Field and Jones resolved which of their attorneys should proceed with the preparation of a formal contract containing the terms and provi-

sions of the letter agreement accepted by them. At the same time Field advised Jones that he was not going to use an existing corporation to complete the purchase but rather would form a new corporation.[1] On August 19, 1968, Field sent to Blackburn & Co. his check for $10,000.00 as a deposit pursuant to the terms of the letter agreement. This check was never cashed by the appellant.

On October 11, 1968, after the parties exchanged several documents in preparation for closing the sale, appellant's attorney sent Field's attorney a letter stating that the proposed corporate setup of Field's new corporation, which was going to make the purchase, was completely unsatisfactory to Triangle from a security standpoint. This letter also set forth guidelines as to five minimum requirements that would be satisfactory to Jones. Approximately two weeks later, Field submitted to the appellant the final corporate information with reference to the corporation he was willing to set up for the purpose of making the purchase. Finally, on November 1, 1968, Jones wrote to Field and stated that since Triangle's minimum security safeguard had not been fulfilled, Triangle would not enter into a formal binding contract for the sale of the properties to Field or his proposed corporation.

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1. The letter agreement specifically stated that Field was making the offer to purchase on behalf of a corporation, either in existence or to be formed, in which he was or would be a stockholder and that Field had the right to assign all of his rights and obligations to such corporation. The letter agreement further specified what security a newly formed corporation would have to provide if such a corporation were to become the buyer.

Subsequently, Field filed a complaint in equity against appellant for specific performance of the August 14, 1968 letter agreement. The chancellor below found that this writing constituted an enforceable contract and therefore decreed that Triangle convey radio stations WEEP and WEEP-FM to Field. The Court en banc dismissed Triangle's exceptions and affirmed the chancellor's findings. From the final decree thus entered, this appeal followed.

Initially, we note that when the evidence is conflicting as to whether the parties intended that a particular writing would constitute a complete expression of their agreement it has been held that it is a question of fact for the trier of fact to determine whether a contract exists. *See Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114 (3d Cir. 1966); *Melo-Sonics Corporation v. Cropp*, 342 F. 2d 856 (3d Cir. 1965); *Goldman v. McShain*, 432 Pa. 61, 247 A. 2d 455 (1968); *see also Building Mart, Inc. v. Allison Steel Manufacturing*, 380 F. 2d 196 (10th Cir. 1967); 3 CORBIN CONTRACTS §§554, 595 (1960). Since the chancellor found that the letter agreement of August 14, 1968 was intended by the parties to be a valid, binding contract, we will not reverse his finding; "unless it appears that he has clearly abused his discretion or committed an error of law [citing cases] and . . . the findings have the full force of a jury verdict and, if supported by sufficient evidence and if affirmed by the court en banc, will not be disturbed on appeal (*Girard Trust Bank v. Sweeney*, 426 Pa. 324, 231 A. 2d 407 (1967)). As we stated in *Masciantonio Will*, 392 Pa. 362, 367, 114 A. 2d 362 (1958), 'The test is not whether we, the appellate court, would have reached the same

result had we been acting as the hearing judge who saw and heard the witness, "but rather whether a judicial mind, on due consideration of the evidence, as a whole, could reasonably have reached the conclusion of the chancellor." ' " *Yuhas v. Schmidt,* 434 Pa. 447, 453-54, 258 A. 2d 616, 619-20 (1969). *See Baldassarre v. Rare Metals Derivatives, Inc.,* 444 Pa. 100, 282 A. 2d 262 (1971).

An examination of the record before us discloses ample evidence from which the chancellor could properly have concluded that the parties intended the letter agreement of August 14, 1968 to be a binding contract. At trial it was clearly established that in the Spring of 1968, Triangle had engaged Blackburn & Co. to obtain a purchaser for the radio stations. After another interested party made an offer below Jones' original quotations and also imposed a contingency upon the offer, Blackburn & Co.'s representative, Harvey, suggested that Jones meet with Field who had made three previous oral offers which were rejected in early August, 1968. Harvey's testimony concerning the meeting shows that he called Field and said Jones would meet with him in Pittsburgh. Harvey further testified that he then advised Jones that Field was coming to Pittsburgh to meet with him on the basis that they would either make a deal or have no further discussions and Jones replied: "That's fine. I would like to get it over with or not. I would like to wind it up tonight."

When Field arrived in Pittsburgh, he reiterated that he had come to Pittsburgh either to enter into a binding contract or terminate negotiations. Thereafter, the parties read and discussed the terms of the proposal and certain changes and/or additions were writ-

ten in by Harvey. After inspecting the radio station facilities, the parties signed the letter agreement, carefully initialing every change. We agree with the chancellor's conclusion that "[a]n examination of the document would indicate it embodied the essential terms to constitute a binding contract. It covers the purchase price, the downpayment to be made, the security to be given, a description of the assets to be sold, and numerous other details usually contained in contracts."[2]

Appellant, however, contends that on its face the August 14, 1968 letter agreement shows that it was not a complete agreement but was merely an arrangement

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2. As alleged in appellee's brief: "An examination of the instant Agreement makes it clear that all essential terms are covered. The purchase price is clearly stated, including the amount down, the amount to be paid at closing, and the subsequent installments. Buyer is given a prepayment right. An interest provision is included. Liquidated damages are provided for if buyer defaults. Security is specified, including a mortgage on all assets, and the pledge of the acquiring corporation's stock or, if an existing corporation's stock cannot be pledged, providing some option to the seller not to proceed. The assets being sold are described. There are provisions concerning a lease of the present site, the monthly rental, the period, the option to renew, and the meaning of a 'net' lease. Responsibility for sellers' accounts receivable and accounts payable are described in detail. There are provisions concerning an FCC construction permit and transmittal site. Buyer agrees to assume the contractual obligations of the radio stations being purchased, and the parties agree too that seller will pay the broker's commission. The Agreement further states that plaintiff is making the offer on behalf of a corporation in existence or to be formed, and that plaintiff's rights in the agreement are assignable to it. The Agreement further allocates the consideration." Brief for Appellee at 17-18.

of terms in contemplation of agreement on a formal contract. The language upon which appellant bases this conclusion is the following:

The opening sentence of the letter, which states: *"Subject to agreement on a formal contract* containing the provisions hereinafter set forth. . . ." (Emphasis added.)

Paragraph 1(a), which provides: "We will pay $175,000 cash at closing. Of this amount, $25,000 will be placed in escrow *at the time of signing a formal contract.* . . ." (Emphasis added.)

On the bottom of page 1 of the letter, where it is provided: "If an existing corporation becomes the Buyer and if its stock cannot be so pledged, Seller shall have the right to examine such buying corporation's balance sheet *prior to execution of a formal contract* and, if such balance sheet is not satisfactory to him, shall then have the right to void this entire transaction." (Emphasis added.)

The language on the last page, which states: "As evidence of our good faith, we attach herewith our check in the amount of $10,000 made payable to Blackburn & Co., Inc. *If this offer is accepted and a formal contract is agreed to,* this amount will become part of the escrow payment mentioned above. *If this offer is not accepted or if a formal contract is not agreed to,* this check will be returned to us without any obligation." (Emphasis added.)

Basically, it is Triangle's position that there is no reasonable construction which can be given this language which would not result in the conclusion that the parties were not to be bound by the mere offer and

acceptance embodied in the writing but, on the contrary were to become bound only when they thereafter agreed to a formal contract. However, as stated above, we believe the chancellor had ample justification in concluding that the letter agreement itself, by its terms, formality and the extraordinary care in its execution, indicates that the signatories intended to bind themselves to an enforceable contract.

Moreover, "it is well-settled in Pennsylvania that where the parties have settled upon the essential terms and the only remaining act to be done is the formalization of the agreement, the latter is not inconsistent with the present contract. . . ." *Melo-Sonics Corporation v. Cropp,* 342 F. 2d 856, 859-60 (3d Cir. 1965). Similarly, as this Court noted in *Goldman v. McShain,* 432 Pa. 61, 69, 247 A. 2d 455, 459 (1968): "Section 26 of the Restatement of Contracts specifically recognizes that parties may bind themselves contractually although they intend, at some later date, to draft a more formal document: 'Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; . . .' Restatement, Contracts §26." *See Moudy v. West Virginia Pulp & Paper Company,* 385 Pa. 39, 121 A. 2d 881 (1956); *Taylor v. Stanley Co. of America,* 305 Pa. 546, 158 A. 157 (1932).

Appellant also argues that the August 14, 1968 letter agreement cannot be construed as an enforceable contract since it omits many material provisions of importance to both parties. Specifically, appellant places much weight on the fact that the agreement does not

specify a closing date.[3] However, we have consistently held that "where no time for performance is provided in the written instrument the law implies that it shall be done within a reasonable time . . ." depending upon the nature of the business. *Lefkowitz v. Hummel Furniture Co.*, 385 Pa. 244, 247, 122 A. 2d 802, 804 (1956). *See L.C.S. Colliery, Inc. v. Globe Coal Co.*, 369 Pa. 1, 84 A. 2d 776 (1951); *Marshall Construction Co. v. Forsyth*, 359 Pa. 8, 57 A. 2d 902 (1948); *Orlowski v. Moore*, 198 Pa. Superior Ct. 360, 181 A. 2d 692 (1962). Furthermore, the letter agreement was subject to the approval of the Federal Communications Commission and since no one could predict when the commission would act, it was not possible to set a specific date for closing.

Appellant also urges that "many other" material terms and conditions that are customarily included in a contract for sale of a going concern are absent from the August 14, 1968 letter agreement.[4] However, the

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3. The time of closing controls: (1) The payment of the balance of the cash consideration; (2) The time when the payment of the installment obligations begins; (3) The beginning of the term for the 10 year lease of the transmitter site and the rent payable thereunder; (4) The beginning of the 90 day period in which the Buyer is to collect Seller's accounts receivable for Seller; and (5) The payment of that portion of the purchase price attributable to the 50 kilowatt construction permit and transmitter.

4. Besides the lack of a closing date, three other omissions are specifically mentioned: (1) The parties did not specify a deadline for obtaining Federal Communications Commission approval; (2) The August 14, 1968 letter did not contain a provision for the furnishing and warranting by Triangle of financial statements; and (3) There was no mention of covenants pertaining to the operation of the business pending the closing of the transaction.

fact that additional provisions would enhance the position of both parties is not controlling. What is necessary is that the parties agree to all the essential terms and intend the letter to be binding upon them. We believe that the letter agreement in question manifests such agreement and intention.

Appellant further submits that the letter of August 14, 1968 was not a final agreement because it calls for an inventory of the assets being purchased[5] and the assumption of the contract obligations of the stations only after Field reviews and approves them.[6] We find no merit in this contention, since these provisions merely provide Field with the opportunity to ascertain whether the contractual obligations are indeed normal and whether the assets are in proper order. Such post-agreement inventories before final closing are standard practice. The essential factor is that the agreement specifies the categories of assets being purchased and the types of obligations being undertaken.

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5. Clause 2 of the letter agreement provides: "2. It is understood and agreed that all of the assets of said radio stations, except for the land at the present transmitter site and cash and accounts receivable, are to be delivered free and clear of any and all liens and encumbrances. An inventory of the assets to be delivered will be prepared and will become a part of the formal contract."

6. Clause 8 of the letter agreement provides: "8. Buyer agrees to assume all of the contractual obligations of said stations which are usual and normal to its operation, such as a studio-office lease, music licensing agreements, news service contracts, and the like, provided however that all such agreements to be assumed are first made available to Buyer for inspection and approval. A list of all such contracts to be assumed will be prepared and will become a part of the formal contract."

Similarly, the agreement is not unenforceable, as appellant suggests, because it provides that the purchase of a 50 kilowatt transmitter is subject to Field's prior inspection and approval. With respect to the purchase of this transmitter, it is clear that the parties contemplated a separate transaction which would not affect the validity of the remainder of the agreement.

We cannot accept Triangle's assertion that it would be unconscionable for a court to enforce the agreement due to the hardship it may cause appellant. Essentially, appellant argues that no reasonable seller would have agreed to sell the radio stations to a corporation where the "only security" for the $475,000.00 installment obligation of the total purchase price of $650,000.00 was a mortgage on the assets and a pledge of the buyer's stock. However, from the record before us it is clear that Myron Jones did so agree and only after an extended discussion of the subject. An individual cannot subsequently contend that he is entitled to further security beyond what he originally agreed. As Mr. Chief Justice [then Justice] *Jones* has stated in an analogous context: "The law demands of every man who bargains with another that he should do so only after due reflection of the possible consequences of his bargain and if he misjudges consequences that could have been expected by a reasonably intelligent man, he cannot rely on the law to remedy his fecklessness. Absent some legally recognized infringement of the law of contract by one party, the law will not reform a written contract so as to make a contract for the parties that they did not make between themselves and certainly never to rescue a party who did not reasonably foresee the consequences of his bargain." *New Charter Coal*

Co. v. McKee, 411 Pa. 307, 312, 191 A. 2d 830, 833 (1963). Furthermore, we agree with the chancellor that the agreement provides for adequate security. The value of the tangible assets is secured by a mortgage. The value of the intangible assets is secured by a pledge of the stock of the corporation which owns them. These terms are clearly those intended by the parties during armslength bargaining and we will not now allow one of the parties to complain.

In the alternative, appellant argues that even if the writing of August 14, 1968 is a binding contract, Triangle acted within its legal rights under the Uniform Commercial Code [hereinafter cited as UCC] in demanding additional security assurances and in refusing to execute a formal contract without receiving the same.[7] This contention is based upon the provisions of Article 2 of the UCC,[8] which applies to the sale of

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7. By letter dated October 11, 1968, appellant's attorney demanded the following security assurances:

Either

1. (a) the new corporation have paid-in capital of $500,000.00; and
   (b) the corporation have no other business interests; and
   (c) the corporation's stock be pledged as security; and
   (d) there be a first mortgage on the assets, as security; and
   (e) Field and his associates give personal endorsements;

Or, alternatively

2. Buyer pay $635,000.00 in cash.

8. Act of April 6, 1953, P. L. 3, § 2-101, *as amended,* 12A P.S. §2-101.

goods. Insofar as is relevant here "goods" are defined in section 2-105(1) of the UCC as "all things which are movable". 12A P.S. §105(1). Sections 2-210 and 2-609 of the UCC, 12A P.S. §§2-210, 2-609, provide that where one of the parties to a contract for the sale of goods either assigns his rights and duties to another or impairs the other party's reasonable expectation of receiving due performance, the other party may demand adequate assurance that the contract will be performed, and the failure to provide such assurance is a repudiation of the contract.

Triangle seeks to apply these provisions of the UCC to the instant case and claims that "reasonable grounds for insecurity" were created since the August 14, 1968 letter agreement provided that Field had the right to assign all of his rights and obligations under the contract to a corporation to be formed and Field notified Jones that a new corporation would be formed to purchase the radio stations. We do not believe that Article 2 of the UCC applies to the instant contract. Rather than being an agreement for the sale of "goods", this is a contract for the sale of the businesses of two radio stations, including their tangible and intangible assets, as a going concern. Although this is a case of first impression in Pennsylvania, the Court of Appeals for the Tenth Circuit was presented with a situation similar to the issue before us in *Foster v. Colorado Radio Corporation,* 381 F. 2d 222 (10th Cir. 1967). There the court held, and we agree, that "the license, goodwill, real estate, studios and transmission equipment [of a radio station] were not movables and hence not 'goods' within the meaning of . . . [the UCC]." 381 F. 2d at 225-26.

We are aware that the *Foster* court went on to hold that the remaining assets sold under the contract, i.e., office equipment and furnishings, were movables. Here, however, the $30,000.00 of physical assets[9] are of little significance to either party when separated from the contract for the sale of the radio businesses and, therefore, we find no reason to view the August 14, 1968 letter agreement as two contracts. We believe that the nature of the transaction, the intention of the parties as reflected by the writing, and the lack of specific reference to designated assets renders inescapable the conclusion that the letter agreement was one integrated contract.

Even assuming that there were two separate transactions, one effecting the sale of "goods" and the other the sale of all remaining assets, appellant's reliance upon sections 2-210 and 2-609 of the UCC as justification for refusing to execute a formal contract is misplaced. First, this is not the situation contemplated under section 2-210 whereby a party contracts for performance by one individual, expecting him to perform, and thereafter discovers that a second individual, an assignee, will perform. As indicated by the chancellor below:

"[T]he letter agreement makes it clear that the parties, at the time the *agreement was executed, knew Mr. Field was going to assign his rights.* The agreement states: 'It is understood that the undersigned is making this offer on behalf of a corporation, either in existence or to be formed, in which he is or will be a stockholder, and that the undersigned has the right to

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9. This figure represents approximately 4.6% of the total purchase price of $650,000.00 and includes the value of such non-movables as towers and fences.

assign all of his rights and obligations under this offer to such corporation.' Thus, the parties knew when the agreement was signed that Field was not going to be the performing party but that a corporation would perform. Moreover, the letter agreement specifically provided for the security which the assignee corporation was to provide. The last paragraph of the first page of the letter agreement states that the buyer's note will be secured by a mortgage on all the assets delivered and the pledge of all of the stock of the newly formed acquiring corporation. Where an agreement, even for the 'sale of goods', expressly states the security which the assignee will provide, the seller cannot later contend that he is entitled to further security beyond what he originally agreed to. The letter agreement provides for adequate security which the plaintiff has always been willing to provide." (Emphasis in original.)

Furthermore, we have already indicated that the security which is provided for the entire contract is adequate. Therefore, it follows that the security for that part of the contract which is for the sale of "goods" is similarly adequate. Clearly, where adequate assurance of performance is already present, and there has been no change in circumstances to give rise to reasonable grounds for insecurity, a demand for additional security under section 2-609 is not justified.

Finally, appellant argues that even if the August 14, 1968 letter agreement is a contract, specific performance is an entirely inappropriate remedy under the circumstances of the instant case. Triangle first contends that the contract is too vague to be specifically enforced. While we agree that it is fundamental law that a decree of specific performance will not be granted unless

the agreement to be enforced is complete and certain, *see, e.g., Pierro v. Pierro,* 438 Pa. 119, 264 A. 2d 692 (1970); *Portnoy v. Brown,* 430 Pa. 401, 243 A.2d 444 (1968); *Berberich v. Berberich,* 383 Pa. 349, 118 A. 2d 445 (1955); *Cheney v. Carver,* 370 Pa. 543, 88 A. 2d 746 (1952), we have already determined that the writing in question is complete and that it encompasses all the essential terms of the bargain.

Appellant also argues that the remedy of specific performance is inappropriate because the granting of such remedy would place the parties in an "impossible position" due to the changes which have occurred during the pendency of this litigation. Briefly, appellant's argument is as follows: The letter agreement of August 14, 1968 specifically referred to the transfer of seller's FCC construction permit to increase the power of WEEP radio station to 50,000 watts and the purchase of Triangle's 50 kilowatt transmitter. Subsequently, after this litigation commenced and pursuant to this permit appellant proceeded to construct a new 50 kilowatt facility. Since both parties agreed that the appellee was not entitled to gratuitously receive the newly constructed facility, the court below decreed specific performance of the remainder of the agreement without reference to the transmitter site. Appellant argues that this decree places the parties in an impossible situation because it results in a division of the two facilities and the licenses to operate them. This, Triangle submits, leaves it without an auxiliary transmitter and gives appellee a 50 kilowatt facility which he does not own.

We agree that the construction of the new transmission facility affects the value of the contract. How-

ever, construction of the facility was undertaken by Triangle with full knowledge that Field was seeking specific performance of the contract. In effect, after unilaterally creating an expensive facility not covered by the agreement, Triangle is now alleging that an oppressive situation exists which makes specific performance inequitable. This Court will not refuse specific performance against a party who, by its own questionable conduct has attempted to make performance of the contract impossible.

In determining that specific performance should be decreed, justice forces us to take into account the enhanced value of the bargain due to the new facility. Contrary to the lower court's decree, we do not deem it proper to separate this transmitter from the rest of the stations' assets since it is obvious that the 50 kilowatt transmitter is an integral part of radio station WEEP. However, rather than allowing appellee to gratuitously benefit from the improved facilities, we believe that the equities of the situation require that appellant be reimbursed for the cost of the new facility.[10] Therefore, the granting of specific performance as to the auxiliary transmitter is conditioned upon payment to Triangle of an amount equal to the actual expenses incurred in

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10. Whether a seller should be allowed to be reimbursed for improvements made by him to the property depends upon the equity of the particular situation. When the circumstances of the case have required it, courts have conditioned decrees upon payment for improvements. *Compare Fitzpatrick v. Allied Contracting Company,* 24 Ill. 2d 448, 182 N.E. 2d 183 (1962) *with Coppom v. Humphreys,* 171 Colo. 410, 467 P. 2d 816 (1970). *See also Calbreath v. Borchert,* 248 Iowa 491, 81 N.W. 2d 433 (1957); Annot., 7 A.L.R. 2d 1205.

constructing the new 50 kilowatt facility. Accordingly, the case must be remanded to the court below to receive testimony and establish the amount that was expended by Triangle in the construction of this facility.

Decree modified and case remanded for further proceedings consistent with this opinion. Each party to bear own costs.

Mr. Chief Justice JONES concurs in the result.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOSEPH M. FIELD, Appellee v. GOLDEN TRIANGLE BROADCASTING, INC. a corporation, Appellant.	No. 100 March Term 1972

Appeal from the Final Decree of the Court of Common Pleas, Civil Division, of Allegheny County at No. 1388, January Term, 1969

Petition for Reargument

To The Honorable, the Justices of the said Court:

NOW COMES Golden Triangle Broadcasting, Inc., Appellant in this proceeding (hereafter called "Petitioner"), by its counsel, John A. Metz, Jr., Metz, Cook, Hanna & Kelly, Cloyd R. Mellott, and Eckert, Seamans, Cherin & Mellott, and respectfully prays your Honorable Court to grant a reargument in this proceeding and, in support thereof, respectfully states as follows:

I. POINTS OVERLOOKED AND/OR MISAPPREHENDED

In modifying the decree of the lower court to include within that decree the 50 kilowatt facility[1] con-

1. This facility is a 50,000 watt facility as compared with the 1,000 watt facility which was the subject of the August 14, 1968 letter.

structed by Petitioner on the sole condition that Appellee reimburse Petitioner for the cost of constructing that facility, your Honorable Court misapprehended and/or overlooked the following points which Petitioner respectfully submits should be reconsidered:

A. Contrary to the statement in the Opinion of your Honorable Court that "Both parties agreed that the appellee was not entitled to gratuitously receive the newly constructed facility", it was expressly agreed by both parties, and by the lower court, that the Appellee had no right whatsoever, gratuitously or otherwise, to a conveyance of the 50 kilowatt facility. Not only was this point expressly agreed to by the Appellee in the lower court, but the Appellee also expressly conceded this point in the brief which it filed on this appeal. This whole case was tried on the basis that, by agreement of the parties, the 50 kilowatt facility was not involved. Accordingly, as stated by this Honorable Court on various occasions, this agreement, which was incorporated in the decree of the lower court, may not be modified by this Honorable Court except for fraud, accident or mistake and there is no evidence whatsoever of such events in this case, or even any assertions thereof.

B. The statement in the Opinion of your Honorable Court that the Petitioner "by its own questionable conduct has attempted to make performance of the contract impossible" is without support in the record and is directly contradicted by the Memorandum, Opinion and Order of the Federal Communications Commission ("FCC") adopted on October 21, 1970, to which Appellee is bound under the doctrine of *res adjudicata*. A copy of that Memorandum, Opinion and Order was attached as

an appendix to the brief filed by Petitioner with your Honorable Court (such brief being hereinafter referred to as "Petitioner's Brief") and another copy is attached in the appendix to this Petition. Petitioner was required under federal law to construct the facility to preserve the construction permit. In proceeding with such construction, Petitioner acted in complete good faith and in accordance with FCC requirements and the federal law applicable thereto.

C. In compelling Petitioner to convey the 50 kilowatt facility to the Appellee merely upon reimbursement by Appellee of Petitioner's costs of constructing that facility, your Honorable Court has misconstrued the authorities cited in footnote 10 of the Opinion and has mandated a result which will violate Petitioner's rights under the due process clauses of the Pennsylvania and United States Constitutions.

II. The Reasons For A Rehearing

Petitioner respectfully submits that a rehearing should be granted for reasons which include the following:

A. Appellee specifically agreed at various times in the course of this proceeding that he has no right whatsoever with respect to the 50 kilowatt facility.

B. Petitioner acted in good faith in constructing the 50 kilowatt facility since it was acting pursuant to a duly adjudicated legal obligation to which adjudication Appellee is bound under the doctrine of *res adjudicata* since he took no appeal from that adjudication. Under the federal law applicable thereto, Petitioner was obligated to proceed with the construction

of the 50 kilowatt facility or lose all rights with respect thereto.

C. This Honorable Court has misconstrued the authorities cited in footnote 10 of the Opinion.

D. Since Appellee did not seek the relief which your Honorable Court has granted by modifying the lower court's decree, and even agreed that it was not entitled to that relief,[2] Petitioner has not had any opportunity whatsoever to present its position to this Honorable Court in opposition to the granting of such relief. From beginning to end, this case was tried by both parties on the premise that the 50 kilowatt facility was not involved. Thus, the matter was not argued in the lower court nor did Petitioner argue the matter to your Honorable Court in Petitioner's Brief or at the oral argument. It is a fundamental element of due process that a party be afforded the opportunity to be heard on any matter affecting its rights before a court adjudicates those rights. Petitioner has been denied this opportunity with respect to this Honorable Court's modification of the lower court's decree which, as modified, requires Petitioner to convey the 50 kilowatt facility to Appellee. Therefore, it is submitted that a rehearing should be granted to afford Petitioner an opportunity to be heard on this matter.

E. In the Opinion of your Honorable Court, no consideration was given to the constitutional issues raised by requiring Petitioner to convey the 50 kilo-

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2. See page 37 of Brief For Appellee where Appellee states as follows: "Both parties agree that plaintiff is not entitled to receive the newly constructed facility."

watt facility to Appellee upon reimbursement of the cost of construction rather than the fair market value of the facility. As stated above, it is submitted that this matter does raise serious constitutional issues of due process which should be considered by your Honorable Court.

F. The mandate of your Honorable Court, if unchanged, will result in a windfall to the Appellee in contradiction of fundamental principles of equity and justice. The Appellee will receive a substantial facility, although never having claimed a right to acquire that facility and, indeed, after agreeing that it was not entitled to that facility. Moreover, it will receive that facility, which was constructed and placed into operation by Petitioner years ago, at a bargain price to which the parties obviously never agreed and which is patently unfair to Petitioner. Accordingly, a rehearing should be granted so that your Honorable Court can reconsider this matter and, at the very least, place the parties in a position where Appellee will not receive a windfall and Petitioner will be entitled to receive fair value for its property.

III. Arguments In Favor Of A Rehearing

A. *The Appellee has specifically agreed that he is not entitled to the 50 kilowatt facility on any basis whatsoever*

In your Honorable Court's Opinion, it is stated that the lower court decreed specific performance of the August 14, 1968 letter without reference to the 50 kilowatt facility "[s]ince both parties agreed that the appellee was not entitled to gratuitously receive the newly constructed facility." This is a fundamentally in-

correct statement. On the contrary, the record is clear that the Appellee has expressly agreed that he is not entitled to receive the 50 kilowatt facility under any circumstances, gratuitously or otherwise, and it was on the basis of that agreement of Appellee that the lower court excluded the 50 kilowatt facility from its decree.

Throughout this proceeding, the Appellee has repeatedly and consistently stated and agreed that it is not entitled to receive the 50 kilowatt facility. Thus, at page 37 of the brief which the Appellee filed with this Honorable Court, the Appellee stated as follows:

> "Both parties agree that plaintiff is not entitled to receive the newly constructed facility."

In the lower court, the Appellee not only stated that it was not entitled to the 50 kilowatt facility but also emphatically stated that it did not want the facility. This position of the Appellee was set forth in a reply brief filed by Appellee in the lower court, a copy of which is attached to this petition as an appendix. In fact, a whole section of that brief (pages 21-22) was devoted to the argument by Appellee that the parties agreed that the 50 kilowatt facility was not included. Section IV of that brief was entitled by Appellee as follows: *"The Parties Agree that the 50 KW Facility is Not Included."* On page 21 of that brief, the Appellee made the following statements:

> "Both parties agree that the 50 kw facility constructed by Defendant after this litigation commenced should not be included in any decree of specific performance. Plaintiff stated that it did not want the facility. Defendant argued that Plain-

tiff should not be 'enriched' by receiving it. There is no dispute here."

Again, at the bottom of page 21 and at the top of page 22 of that brief, Appellee stated that "Plaintiff does not want that facility. . . ."

It was on the basis of the clear and express agreement of Appellee that it was not entitled to the 50 kilowatt facility that such facility was excluded by the lower court from its decree of specific performance. As was stated by Judge Lewis in his adjudication with regard to the 50 kilowatt facility (592a):

"Both parties agree that this new facility, not in existence on August 14, 1968, should not be included in any decree of specific performance and, accordingly, it will not be included."

Under these circumstances, it is clear that the portion of the lower court's decree which excluded the 50 kilowatt facility is the equivalent of a consent decree and should be given the same effect. As has repeatedly been held by your Honorable Court, a consent decree is a binding contract which is not subject to judicial modification in the absence of fraud, accident or mistake, none of which are present or even alleged in this case. Thus, in *Jones Mem. Bapt. Ch. v. Brackeen,* 416 Pa. 599 (1965), your Honorable Court unanimously affirmed the lower court's decree in favor of the appellee and, in doing so, stated (at pp. 602-603):

" 'A consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties — a contract binding the parties thereto to the terms thereof. [Citing a case]. As a contract, the court, in the absence of fraud, accident or mistake, had

neither the power nor the authority to modify or vary the terms set forth' [citing a case]."

For the foregoing reasons, it is respectfully submitted that your Honorable Court has misapprehended and/or overlooked the binding effect of the Appellee's agreement that he is not entitled, on any basis, to the 50 kilowatt facility and that, therefore, your Honorable Court acted without authority and contrary to precedent in modifying the lower court's decree to include the 50 kilowatt facility.

B. *Petitioner acted in good faith in constructing the 50 kilowatt facility pursuant to a duly adjudicated legal obligation under federal law*

Contrary to the statement in the Opinion of your Honorable Court that Petitioner's conduct was "questionable" in building the 50 kilowatt facility, the Petitioner acted properly and in complete good faith in proceeding with such construction under and pursuant to a duly adjudicated legal obligation. This is made abundantly clear by the Memorandum Opinion and Order of the FCC of October 21, 1970, a copy of which was attached to Petitioner's Brief as an appendix and another copy of which is attached in the appendix to this Petition. In that Memorandum Opinion and Order, the FCC considered and approved Petitioner's request to conduct program tests with the new 50 kilowatt facility. As explained in that Memorandum Opinion and Order, the Appellee appeared in opposition to the granting of such authority and, in doing so, made the same arguments that it made to this Honorable Court that Petitioner had allegedly constructed the facility "at its own risk" and "with full knowledge" that Appellee was

seeking to have the August 14, 1968 letter specifically enforced by the Pennsylvania courts. In rejecting the Appellee's arguments, the FCC made the following statement which also was quoted at page 63 of Petitioner's Brief:

> "In issuing a construction permit to Golden Triangle to increase the operating power of WEEP to 50 kw, a finding was made that the construction of appropriate facilities thereunder and operation of the station with such facilities would serve the public interest, convenience and necessity. *Once the permit was issued, Golden Triangle was under an obligation to construct these facilities in a diligent manner,* and upon completing construction, was entitled to request, pursuant to section 73.96 (a) of the rules, authority to commence program tests with its new operation." (Emphasis supplied).

Thus, it was clearly incorrect for your Honorable Court to conclude that Petitioner "engaged in questionable conduct" by proceeding with construction of the 50 kilowatt facility. On the contrary, as expressly stated by the FCC, Petitioner was complying with its obligations under the law since, as the FCC held, Petitioner was obligated to construct the facility in a diligent manner once the construction permit was issued. That construction permit had been issued prior to the signing of the August 14, 1968 letter.[3]

It is also clear under federal law and the rules and regulations of the FCC that Petitioner was required

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3. Significantly, Appellee accepted and is bound by that FCC decision since he took no appeal from it.

to proceed with the construction in order to keep the 50 kilowatt construction permit in effect. Section 319(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 319(b), provides as follows with regard to station construction permits:

> "Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the Grantee."

Pursuant to this statutory requirement, Section 21.34(a) of the FCC rules and regulations (47 C.F.R. p. 22, as revised October 1, 1972) further provides:

> "A construction permit shall be automatically forfeited if construction has not been commenced within the time specified therein or if the station is not ready for operation within the term of the construction permit, or within such additional time as the Commission may have allowed upon a proper showing, upon FCC Form 701 filed prior to the date sought to be extended, that failure to commence or complete construction was due to causes not under the control of the permittee (see §§ 21.14(d) and 21.33)."

The FCC has customarily denied requests for extensions of construction permits, with a resulting termination of the permits involved, because the reasons for the requests were not beyond the control of the Grantee.

For example, extensions have been refused when additional time was requested because of business judgments, personal matters, indefinite negotiations for sale of the construction permit and FAA negotiations for approval of the antenna site. See *Andrew J. Crevolin,* 37 FCC 2d 309, 25 RR 2d 308 (1972); *Bay Video, Inc.,* 25 FCC 2d 167, 19 RR 2d 639 (1970); *Northeast TV Cablevision Corp.,* 21 FCC 2d 442, 18 RR 2d 333 (1970); *Radio Longview, Inc.,* 19 FCC 2d 966, 16 RR 2d 1026 (1969); *Nelson Broadcasting Co.,* 18 FCC 2d 609, 16 RR 2d 875 (1969); *Telemusic Company,* 4 FCC 2d 221, 8 RR 2d 336 (1966); *Joe L. Smith, Jr., Inc.,* 5 RR 2d 582 (1965).

Significantly, the FCC has also determined that the filing of an application for extension of a construction permit does not excuse the Grantee from its obligation to continue with construction. *Radio Longview, Inc., supra,* 19 FCC 2d at p. 970.

From the foregoing, it is clear that Petitioner was required to proceed with construction of the 50 kilowatt facility to protect the construction permit. And, as previously pointed out, that is exactly what the FCC held when this matter was before it. (See pages 8-9, *supra*). Furthermore, it is also apparent that the FCC would not have permitted delays in construction and extensions of the permit on the ground that this litigation was in process. As indicated in Section 319(b) of the Communications Act and in Section 21.34(a) of the FCC rules and regulations, extensions can be obtained only for reasons equivalent to *force majeure.* That the pendency of this litigation would not have been considered *force majeure* is apparent from the above mentioned

Appendix B.

Memorandum Opinion and Order of the Commission in which the Commission, after having been apprised by Appellee of the pendency of this suit, nevertheless held that Petitioner was required to diligently proceed with the construction of the facility. See also *Radio Longview, Inc., supra,* where the Commission held, as noted above, that a permittee was obligated to continue with construction even after having filed an application for extension.

The question of Petitioner's obligations with respect to the construction permit is clearly one of federal law which is within the exclusive jurisdiction of the FCC. Accordingly, in view of the FCC's holding that the Petitioner was obligated to proceed with the construction of the 50 kilowatt facility, we respectfully submit that your Honorable Court has not given due consideration to the applicable federal law and its binding effect on Petitioner when this Honorable Court characterized Petitioner's action in proceeding with construction as "questionable" conduct.

It is also noteworthy that paragraph 5 of the August 14, 1968 letter required Petitioner to use its best efforts to keep the construction permit in effect. Accordingly, Appellee, in the event that Petitioner had not proceeded with construction and allowed the permit to lapse, would have had a basis for contending that Petitioner had breached any obligations it may have had under that letter. Thus, if the mandate of your Honorable Court is not changed, Petitioner will have been caught on the horns of a dilemma by being penalized for acting one way in accordance with its duly adjudicated legal obligations, and having been subject to penalty if it had not acted in that way.

Petitioner certainly should not be penalized for having litigated, in good faith, the issue of whether the August 14, 1968 letter was a binding and enforceable contract. While your Honorable Court has decided this issue contrary to Petitioner's position, it is submitted that the issue manifestly is one upon which the minds of reasonable men can differ.

Concluding this point, it is respectfully submitted that Petitioner acted properly and in complete good faith and in accordance with a duly adjudicated legal obligation in proceeding with construction of the 50 kilowatt facility; that it was required by federal law to proceed diligently with such construction or lose its rights under the 50 kilowatt permit; that Petitioner should not, in any way, be prejudiced or penalized in this case for having proceeded with such construction under such conditions; and that, therefore, your Honorable Court misapprehended this point to Petitioner's prejudice by including the 50 kilowatt facility in the decree of specific performance on the sole ground that Petitioner's action in constructing the facility was "questionable" conduct.

C. *If the 50 kilowatt facility is to be included within the decree, Petitioner is entitled to be paid the present fair market value of that facility, and not merely the cost of constructing the facility some years ago*

Wholly apart from any question of whether the 50 kilowatt facility properly is includable in the decree of specific performance, there is no basis in the record of this case or in the law for Petitioner to be compelled to "sell" that facility to Appellee at a price equal only

to the cost of construction. On the contrary, the only possible "price" that can be payable under these circumstances is the fair market value of the 50 kilowatt facility or the increase in market value of the original facility by reason of the construction of the 50 kilowatt facility.

The Opinion of your Honorable Court first indicated approval of this principle by stating that "Justice forces us to take into account the enhanced value of the bargain due to the new facility." Such enhanced value can in no way be measured by mere costs of construction. Moreover, the cases cited in footnote 10 of your Honorable Court's Opinion do not support the result reached by your Honorable Court, but rather, to the extent they deal with the issue, support the principle that Appellee is entitled to payment for the fair market value of the 50 kilowatt facility if it is to be included in the decree of specific performance. This is particularly true where, as here, the improvements represent a substantial change in the property involved. Here, a new large 50,000 watt transmitter facility was constructed on a new site while the property covered by the August 14, 1968 letter was a small 1,000 watt transmitter facility.

Thus, in *Fitzpatrick v. Allied Contracting Company,* 24 Ill. 2d 448, 182 N.E. 2d 183 (1966), the Illinois Supreme Court held that the defendants, as counterclaimants, were entitled to a decree of specific performance with reference to property on which the plaintiffs had constructed improvements. However, although the court specifically made mention of the cost of the improvements, it did not limit plaintiff to recovery of those costs but instead conditioned the defendant's

right to specific performance "upon payment to plaintiffs of an amount equal to the actual *enhancement of market value* of the premises caused by the improvements made by plaintiffs." (Emphasis supplied). (182 N.E. 2d at 188). Thus, the *Fitzpatrick* case, which is cited by your Honorable Court in support of the modification of the lower court's decree, would require that Petitioner be entitled to recover from Appellee the market value of the 50 kilowatt facility rather than the construction cost thereof.

The other cases cited in footnote 10 of your Honorable Court's Opinion did not deal to any extent with the issue of the measure of reimbursement. Accordingly, only the *Fitzpatrick* case, of the cases cited by your Honorable Court, addressed itself to the question of the measure of reimbursement for improvements to property covered by a decree of specific performance and that case expressly held that the measure was to be market value.

Moreover, it is further submitted that the due process clauses of the Pennsylvania and United States Constitutions require that Petitioner be entitled to recover the present market value of the 50 kilowatt facility as a precondition to any modified decree of specific performance covering that facility. For one thing, the mere reimbursement to Petitioner of its construction costs cannot possibly put Petitioner in the position of being made whole. Those costs were incurred years ago and, had the moneys been placed by Petitioner in other investments, Petitioner would have had the opportunity of realizing a growth of that investment as well as a reasonable rate of return thereon. This is wholly independent of the fact that inflation has sub-

stantially reduced the value of the dollars which Petitioner originally invested in the 50 kilowatt facility.

Further, if the parties had bargained for the sale of the 50 kilowatt facility, they manifestly would have bargained for a price equivalent to market value. However, even though the parties never agreed to such a sale and the Appellee has expressly agreed that he does not want and is not entitled to the facility, your Honorable Court, in effect, has made such a contract between the parties and, moreover, by limiting the "price" to the costs of construction, has made a contract that the parties themselves would never have made. It is respectfully submitted that in reaching this result, your Honorable Court did not proceed in accordance with the statement of Mr. Chief Justice [then Justice] Jones in the *New Charter Coal Co.* case which was quoted in your Honorable Court's Opinion. In that quote, it is stated that "the law will not reform a written contract so as to make a contract for the parties that they did not make for themselves." Yet that is exactly what this Honorable Court has done in this case even in the face of an agreement by both parties that the 50 kilowatt facility was not covered by the August 14, 1968 letter.

In addition, it is also noteworthy that the market value measure of compensation is the standard in eminent domain cases as a recognition that compensation equal to market value is the only proper basis for preserving a person's constitutionally protected property rights. *Ward v. Commonwealth,* 390 Pa. 526 (1957).

In conclusion, it is submitted that for this Court to mandate that the Petitioner be compelled to convey

the 50 kilowatt facility to the Appellee at any price other than market value is contrary to the agreement of the parties, is not supported in fact or law, is contrary to the authorities relied upon by your Honorable Court, and would constitute a deprivation of Petitioner's property without due process of law in violation of Article 1, Section 10 of the Pennsylvania Constitution and the Fourteenth Amendment of the Federal Constitution.

WHEREFORE, your Honorable Court is respectfully requested to grant a reargument in this case.

/s/ JOHN A. METZ, JR.
METZ, COOK, HANNA & KELLY

/s/ CLOYD R. MELLOTT
/s/ C. ARTHUR WILSON
ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys for Golden Triangle
Broadcasting, Inc., Petitioner

[*Appendix to Petition for Reargument omitted.*]

APPENDIX C

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT
No. 100 March Term, 1972

JOSEPH M. FIELD v. GOLDEN TRIANGLE BROADCASTING INC., A CORPORATION, Appellant	No. 1388 January Term, 1969 (Equity — Specific Performance)

Appeal from the final decree of March 28, 1972, of the Court of Common Pleas, Civil Division, of the County of Allegheny

Certified from the Record

May 14, 1973, Petition for Reargument, filed.
May 21, 1973, Answer filed.

Order

June 20, 1973
Petition denied.
Per Curiam

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court at Pittsburgh, Pa. this 5th day of November, 1973

/s/ SALLY MRVOS
Deputy Prothonotary

APPENDIX D

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
Civil Division

JOSEPH M. FIELD,
Plaintiff

v.

GOLDEN TRIANGLE BROADCASTING
INC., a corporation,
Defendant

No. 1388
January Term,
1969
In Equity

Adjudication

Lewis, P.J.

Plaintiff Joseph M. Field brought this action against the defendant for specific performance of an alleged agreement entered into between the parties on August 14, 1968. The agreement referred to was executed by the plaintiff and Myron Jones as President and virtually sole stockholder of the Golden Triangle Broadcasting, Inc.

The main issue in this case is whether the letter agreement of August 14, 1968 constituted an *enforceable contract*. Another issue involved is whether or not the defendant had the right to cancel the contract when it demanded certain security which the plaintiff refused to provide.

Appendix D.

The defendant alleges that the letter agreement of August 14, 1968 does not constitute a binding agreement as it was made "subject to agreement on a formal contract" and that even if it were a binding contract the defendant subsequently became entitled to cancel that contract.

Based on the testimony and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

First: Plaintiff is an individual residing in the City of Philadelphia, Pennsylvania.

Second: Golden Triangle Broadcasting, Inc. is a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania.

Third: Defendant Golden Triangle Broadcasting, Inc., is a closely held corporation whose assets consist solely of radio stations WEEP and WEEP-FM in Pittsburgh, Pennsylvania.

Fourth: Myron Jones is and has been the President and Chief Executive Officer of the defendant and is the owner of 597 shares of the 600 authorized and outstanding shares of the defendant corporation.

Fifth: During the first half of August 1968, and prior to August 14, the defendant corporation, acting through its President, Mr. Jones, was endeavoring to find a satisfactory purchaser for its radio stations and had negotiated through Blackburn & Co. with various possible purchasers.

Sixth: On or about August 14, 1968, Jack Harvey of Blackburn & Co. arranged a meeting between plain-

tiff Field and Jones at Pittsburgh for the evening of August 14, 1968. Discussions were held relative to the purchase of radio stations WEEP and WEEP-FM by Field.

Seventh: Jack Harvey, the broker hereinbefore referred to, prepared a typewritten letter dated August 14, 1968, which he brought with him to the meeting held on the 14th between the principals.

Eighth: During the discussions, various pen and ink changes were made by Harvey in the text of the typewritten letter and the changes were initialed by Field and Jones.

Ninth: In the early hours of August 15, 1968, the parties visited the facilities of radio stations WEEP-AM and FM in the Fulton Building, Pittsburgh. After viewing the premises, Field and Jones signed the letter agreement and accepted and exchanged executed copies.

Tenth: The first paragraph of the letter agreement contained the following language:

> "Subject to agreement on a formal contract containing the provisions hereinafter set forth, and subject to FCC approval, we hereby offer to purchase . . . on the following terms and conditions: . . . ."

Eleventh: Other parts of the letter agreement refer to an agreement on and/or preparation of a formal contract.

Twelfth: The next to the last paragraph of the letter agreement states as follows:

> "If this offer is accepted, both parties agree to immediately proceed with the preparation of a formal contract containing the terms and provi-

sions of this letter as well as with the preparation and execution of all necessary applications for filing with the FCC for effecting this proposed transfer."

Thirteenth: The letter agreement stated that Field was making the offer to purchase on behalf of a corporation either in existence or to be formed in which he was or would be a stockholder and that Field had the right to assign all of his rights and obligations to such corporation.

Fourteenth: The letter agreement specifically provided what security a newly formed corporation would have to provide if such a corporation were to become the buyer.

Fifteenth: The letter agreement covers all of the essential terms of the transaction — purchase price, downpayment, payout, interest, security, description of the assets, lease of site, how receivables are to be handled, etc.

Sixteenth: On August 15, 1968, a discussion was held between Field and Jones as to which of their attorneys should proceed with the preparation of a formal contract containing the terms and provisions of the letter agreement accepted by them, and it was resolved that the initial drafting would be done by defendant's attorney, John H. Midlen, who would submit the draft to plaintiff's attorney, Marcus Cohn, and that the two would then work together to the end of the agreement on the formal contract.

Seventeenth: In the same conversation, Field stated that he was not going to use an existing cor-

poration to complete the purchase but would form a new corporation.

Eighteenth: On August 19, 1968, Field sent to Blackburn & Co. his check for $10,000 as a deposit pursuant to the terms of the letter agreement. This check was never cashed by the defendant.

Nineteenth: During the next two months the parties exchanged several documents in preparation for closing the sale.

Twentieth: On October 11, 1968, Attorney Midlen's office sent to Attorney Cohn's office a letter stating that the proposed corporate setup by Field of the new corporation, which was going to make the purchase, was completely unsatisfactory to Jones from a security standpoint, setting forth guidelines as to five minimum requirements that would be satisfactory to Jones, setting October 25, 1968 as a deadline for Field's supplying the security.

Twenty-first: On October 24, 1968, the plaintiff submitted to defendant the final corporate information with reference to the corporation he was willing to set up for the purpose of making the purchase.

Twenty-second: On November 1, 1968, Jones wrote to Field stating that since the defendant's minimum security safeguards had not been fulfilled, Golden Triangle would not enter into a formal binding contract for the sale of the properties to Field or his proposed corporation.

Twenty-third: On December 13, 1968, Field brought this action in equity against the defendant for specific performance of the writing of August 14, 1968, alleging

it to be an agreement pursuant to which Field agreed to purchase and Golden Triangle agreed to sell radio stations WEEP-AM and FM and assets relating to the operation and transmission activities of said radio stations.

DISCUSSION

The letter agreement of August 14, 1968 provides that "Subject to agreement on a formal contract containing the provisions hereinafter set forth, and subject to FCC approval . . ." and then sets out with great specificity all of the terms of an agreement of sale. It is the defendant's contention that this "Subject to" clause prevents a binding contract from being consummated until a formal contract was drafted and signed by the parties. With this contention the Court does not agree.

It is well settled that where all of the terms of a contract are agreed upon and there is nothing left to do but to formalize it, it constitutes a binding contract. *Milo-Sonics Corporation v. Cropp,* 342 F.2d 856 (3rd Cir., 1965); *Moudy v. West Virginia Pulp & Paper Co.,* 385 Pa. 39 (1956); *Ketchum v. Conneaut Lake Co.,* 309 Pa. 224 (1932); *Kurtz v. Rochester Machine Corporation,* 17 Beaver LJ 15 (1955).

Not only must we look at the precise language that was used in determining whether the parties intended to enter into a binding agreement, but we must determine from the surrounding circumstances what the true intentions of the parties were. *Goldman v. McShain,* 432 Pa. 61 (1968). What were the facts and circumstances leading up to the signing of the alleged contract dated August 14, 1968?

Appendix D.

The testimony at the trial established the fact that Myron Jones, representing Golden Triangle Broadcasting, Inc., engaged Blackburn & Co., media brokers, to see if they could get a buyer for the assets of the above-named company. Mr. Jones quoted the price his company expected for the sale of its assets. Blackburn & Co. obtained several prospective buyers who made offers but they were not acceptable to the defendant. Plaintiff Joseph Field of Philadelphia became interested in purchasing the stations and Jack Harvey of Blackburn & Co. made arrangements with Myron Jones to meet with Field. On August 14, 1968, Jack Harvey drafted an offer letter embodying the terms originally suggested to Blackburn & Co. in the spring of 1968. The offer letter called for security in the nature of a mortgage on the assets and a pledge of the stock of the corporation which acquired the assets.

On the evening of August 14, 1968, Harvey and Jones met in Pittsburgh, before Field appeared, and Harvey showed Jones the draft letter which Jones approved. When Field appeared, he said he had come to make a deal that night or not at all. Harvey showed the letter to Jones. Jones read it and after discussing the terms of the proposal, certain changes were written in, in ink, some for the benefit of Field and some for the benefit of Golden Triangle Broadcasting, Inc. After this was done, the parties signed the document.

An examination of the document would indicate it embodied the essential terms to constitute a binding contract. It covers the purchase price, the downpayment to be made, the security to be given, a description of the assets to be sold, and numerous other details usually contained in contracts.

Appendix D.

The letter dated August 14, 1968 which was prepared by Blackburn & Co., agents for the defendant, and which contained the offer which was accepted, started off as follows:

> "Gentlemen:
>
> Subject to agreement on formal contract containing the provisions hereinafter set forth . . . ."

The next to the last paragraph of the letter contains the following language:

> "If this offer is accepted, both parties agree to immediately proceed with the preparation of a formal contract containing the terms and provisions of this letter . . . ."

If the first paragraph of the letter hereinbefore referred to had omitted the word "agreement" and it merely said "Subject to a formal contract," there seems to be no doubt that the writing executed on August 14, 1968 would be considered a binding contract and that the mere fact that it had to be formalized later would have no effect on its legal significance.

In the case of *Milo-Sonics Corporation v. Cropp, supra,* we find the following language:

> "Further, it is well-settled in Pennsylvania that where the parties have settled upon the essential terms and the only remaining act to be done is the formalization of the agreement, the latter is not inconsistent with the present contract . . . ."

Did the parties in this case intend the letter offer of August 14, 1968 to be a mere letter of understanding and that it would not be binding unless it was followed up by a formal contract which had to be accepted by both parties?

Appendix D.

As has been stated before in this adjudication, the intention of contracting parties as to whether they are to be bound by an oral or informal agreement prior to the drafting and execution of a contemplated formal writing is to be determined by the surrounding facts and circumstances. *Goldman v. McShain, supra;* American Jurisprudence, Second Edition, Sec. 29.

The evidence is clear that the plaintiff came to Pittsburgh on August 14, 1968 to purchase the defendant's radio stations. An offer was made in writing on that date to purchase the stations, at a fixed price. After spending several hours going over the offer and making numerous pencil changes in the writing, the defendant, through its authorized representative, accepted the offer.

It seems clear to the Court that it was the intention of the defendant to sell its radio stations at the price and at the terms agreed upon. While the writing of August 14, 1968 says "Subject to an agreement on a formal contract," it also says that if the offer is accepted (which it was), the parties agree to immediately proceed with the preparation of a formal contract containing the terms and provisions of the August 14, 1968 writing.

It would seem that the words "subject to an agreement on a formal contract" had very legal significance because it was qualified by another provision to the effect that the terms arrived at in the writing of August 14 had to immediately be incorporated in a formal agreement, which meant that both parties were required under their own agreement to approve the formal contract if it contained the terms agreed on in the above-

mentioned August 14, 1968 writing. Actually there was nothing to reach an agreement on in the formal contract because the letter offer of August 14, 1968 contained all the terms of the agreement that the parties signified they wanted contained therein.

Therefore, it would seem that the parties intended that the offer and acceptance of August 14, 1968 constituted the entire agreement and that the only thing that remained to be done was to put it in formal legal terms. In fact, the evidence clearly shows that the only reason that a formal contract was not drawn up and signed by the parties was because the Washington attorney for the defendant was not satisfied with the security arrangements, although the defendant had agreed to the security arrangements by accepting the plaintiff's offer of August 14, 1968.

Accordingly, the Court finds that the parties entered into a binding contract on August 14, 1968 and the only other step required was to formalize it by couching it in the proper legal terms.

The defendant further alleges that even if the letter agreement of August 14, 1968 did constitute a binding contract, it later became entitled to cancel that contract when the plaintiff refused to furnish additional security. With that contention the Court cannot agree.

The defendant's contention is based on the provisions of the Uniform Commercial Code, Title 2, dealing with the sale of goods. Sections 210 and 609 (12A. P.S., 2-210 and 2-609) of the Uniform Commercial Code provide that where one of the parties to a contract for the sale of goods assigns his rights and duties to another,

the other party may, where justified, demand assurance from the assignee that he will be able to perform, and the failure by the assignee to provide such assurance within 30 days is a repudiation of the contract.

Defendant seeks to apply these sections of the Uniform Commercial Code since the letter agreement provided that Field had the right to assign all of his rights and obligations under the contract to a corporation to be formed and since Field notified Jones that a new corporation would be formed to purchase the radio stations in question.

It is the Court's opinion that the Sale of Goods provisions of the Uniform Commercial Code do not apply to the contract in the case at bar. There are no Pennsylvania cases in point but the case of *Foster v. Colorado Radio Corporation,* 381 F.2d 222 (9th Cir., 1967) held that an agreement to sell the assets of a radio station did not constitute a "sale of goods" under the Uniform Commercial Code and this Court will follow that authority.

Even if the Uniform Commercial Code were applicable, this Court believes that the sections the defendant is attempting to apply are intended to operate only where postagreement assignments are not originally contemplated by the parties and where the assignment creates new grounds for additional security.

First, the letter agreement makes it clear that the parties, at the time the *agreement was executed, knew Mr. Field was going to assign his rights.* The agreement states:

> "It is understood that the undersigned is making this offer on behalf of a corporation, either in

existence or to be formed, in which he is or will be a stockholder, and that the undersigned has the right to assign all of his rights and obligations under this offer to such corporation."

Thus, the parties knew when the agreement was signed that Field was not going to be the performing party but that a corporation would perform. Moreover, the letter agreement specifically provided for the security which the assignee corporation was to provide. The last paragraph of the first page of the letter agreement states that the buyer's note will be secured by a mortgage on all the assets delivered and the pledge of all of the stock of the newly formed acquiring corporation. Where an agreement, even for the "sale of goods," expressly states the security which the assignee will provide, the seller cannot later contend that he is entitled to further security beyond what he originally agreed to. The letter agreement provides for adequate security which the plaintiff has always been willing to provide.

Since this Court stands ready to grant the plaintiff its request for specific performance, one other issue must be disposed of. Paragraph 7 of the letter agreement provided that the seller would deliver to the buyer an option to lease and/or purchase a new transmitter site for a 50 k.w. installation. However, after the dispute in this case arose, the defendant of its own accord exercised this option and expended great amounts of money in constructing a new 50 k.w. facility. Both parties agree that this new facility, not in existence on August 14, 1968, should not be included in any decree of specific performance and, accordingly, it will not be included.

Appendix D.

CONCLUSIONS OF LAW

First: On August 14, 1968, plaintiff and defendant entered into a binding, valid and effective agreement for the sale by defendant to plaintiff of all of the assets relating to radio stations WEEP-AM and WEEP-FM in Pittsburgh, Pennsylvania.

Second: All of the events and circumstances, including the terms of the letter agreement of August 14, 1968, its formality and the manner of its execution and circumstances surrounding same, as well as the testimony taken at trial, evidence the intention of plaintiff and defendant to be bound by the terms of that agreement.

Third: Plaintiff performed all of the conditions which he was required to perform under the said agreement up to the time of defendant's breach of contract.

Fourth: Defendant had no right under this contract to demand additional security and plaintiff's refusal to supply the same did not constitute a repudiation of the contract.

Fifth: On November 1, 1968, defendant advised plaintiff that it would not proceed further with their undertaking, thereby breaching the agreement of August 14, 1968.

Sixth: Radio stations WEEP and WEEP-FM are unique property.

Seventh: Plaintiff is without an adequate remedy at law.

Appendix D.

Eighth: Plaintiff is entitled to specific performance of the August 14, 1968 agreement.

Ninth: By its actions following the institution of the instant action, defendant has made it impossible to transfer to plaintiff the option to acquire a new transmitter site as provided in paragraph 7 of the August 14, 1968 agreement. Since it is defendant's own actions which created this impossibility, plaintiff is entitled to specific performance of the remainder of the agreement without reference to the said transmitter site.

Decree Nisi

AND NOW, to-wit, this 15th day of July, 1971, after consideration of this case and for the reasons set forth in the within Adjudication, IT IS ORDERED AND DECREED that the defendant convey to the plaintiff radio stations WEEP and WEEP-FM in accordance with their letter agreement of August 14, 1968, not including, however, the radio transmitter referred to in paragraph 6 and 7 of the August 14, 1968 writing.

BY THE COURT

LEWIS, J.

APPENDIX E

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.
Civil Division

JOSEPH M. FIELD Plaintiff v. GOLDEN TRIANGLE BROADCASTING, INC., a corporation, Defendant.	No. 1388 January Term, 1969 In Equity

BEFORE: LEWIS and WATSON, JJ.

Opinion

Lewis, J.

This matter comes before the Court en banc on defendant's exceptions to the adjudication of the chancellor filed pursuant to Pa. R.C.P. 1518. The facts as set forth in said adjudication will be included herein by reference. The decree nisi directed the defendant, Golden Triangle Broadcasting, Inc., to convey to the plaintiff, Joseph M. Field, Radio Stations WEEP and WEEP-FM in accordance with the letter agreement dated August 14, 1968, not including however the radio transmitter referred to in paragraphs 6 and 7 of the above-mentioned writing. The chancellor concluded that the August 14, 1968 writing constituted an enforceable contract; that the agreement to sell the assets of a

radio station did not constitute a sale of goods under the Uniform Commercial Code; and that even if the Uniform Commercial Code were applicable, the sections the defendant attempts to apply are intended to operate only where postagreement assignments are not originally contemplated by the parties and where the assignment creates new grounds for additional security.

Defendant first takes exception to the Court's conclusion that the writing of August 14, 1968 "constitutes the entire agreement and that the only thing that remained to be done was to put it in formal legal terms." To support its contention that the writing in question was not a complete contract, defendant points to the following paragraph appearing at page 3 of said writing:

> "As evidence of our good faith, we attach hereto our check in the amount of $10,000 made payable to Blackburn & Co., Inc. If this offer is accepted and a formal contract is agreed to, this amount will become a part of the escrow payment mentioned above. If this offer is not accepted or if a formal contract is not agreed to, this check will be returned to us without any obligation."

It is argued that the foregoing language establishes that not one but two meetings of the minds of the parties were required before the parties were to be bound to perform under the terms of the August 14, 1968 writing. The Court stated in the Adjudication dated July 15, 1971, that "where all the terms of a contract are agreed upon and there is nothing left to do but to formalize it, it constitutes a binding contract", and "Not only must we look at the precise language that

was used in determining whether the parties intended to enter into a binding agreement, but we must determine from the surrounding circumstances what the true intentions of the parties were." Applying those principles to the circumstances here involved, including the language from the writing quoted above, the Court must conclude that the parties entered into a binding contract on August 14, 1968.

Defendant further contends that "if the writing of August 14, 1968 is a contract at all, then it is a contract for the sale of goods within the meaning of Article 2 of the Uniform Commercial Code," and that it became entitled later to cancel that contract when the plaintiff refused to furnish additional security. Article 2 of the Uniform Commercial Code entitled "Sales" provides in Section 102 (12 A P.S. 2-102):

> "Unless the context otherwise requires, this Article applies to transactions in goods; . . . ."

The circumstances surrounding this transaction and the writing of August 14, 1968, concern the sale of a radio station as a going concern. The value of the moveables were an insignificant part of the purchase price of $650,000. Clearly the parties did not view any part of the transaction as a sale of goods. That the defendant considered it as a sale of a going concern is evidenced by its disproportionate request for additional security. That request attempted to secure the entire purchase price, not just the value of the moveables.

As previously stated in this Court's Adjudication, even if the Uniform Commercial Code were applicable, the sections cited by the defendant would not apply since those sections are intended to operate only where

a postagreement assignment not originally contemplated is made and where that assignment creates new grounds for insecurity.

The defendant excepted to the language used by the Court in excluding the new 50 k.w. facility not in existence on August 14, 1968, from the decree for specific performance. To make the Court's adjudication perfectly clear in that regard, the decree will be amended by changing the Court's language to read as follows:

". . . not including, however, the new 50 k.w. facility not in existence on August 14, 1968."

Accordingly, defendant's Exceptions to the Adjudication will be dismissed.

Final Decree

AND NOW, to-wit this 28th day of March, 1972, after argument and upon due consideration of the record and the briefs of counsel, IT IS ORDERED that the language used by the Court in excluding the 50 k.w. facility from the decree of specific performance is amended to read as follows:

". . . not including, however, the new 50 k.w. facility not in existence on August 14, 1968.";

IT IS FURTHER ORDERED that defendant's remaining exceptions be and the same are hereby dismissed and the Decree Nisi is affirmed and made final.

BY THE COURT,

LEWIS, J.

APPENDIX F

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Application of GOLDEN TRIANGLE INC., RADIO STATION WEEP, PITTSBURGH, PA. For License To Cover Construction Permit for Changed Facilities and Request for Program Test Authority	File No. BL-12753

Memorandum Opinion and Order

(Adopted October 21, 1970; Released October 28, 1970)

(Reported in 26 F.C.C. 2d 193)

BY THE COMMISSION:

1. The Commission has for consideration: (a) the above-captioned application and request for program test authority; (b) petition to withhold action on the application and request for program test authority, filed on behalf of Joseph M. Field (Field), principal officer and stockholder of the licensees, or of the parent corporations of the licensees, of FM stations WAYL, Minneapolis, Minnesota, KLEF, Houston, Texas, and KBRG, San Francisco, California; (c) applicant's (Golden Triangle) opposition pleading; and (d) related pleadings and correspondence.

2. The above-captioned application is for a license to cover a construction permit issued to Golden Triangle on March 15, 1967, which authorized an increase in the operating power of daytime-only station WEEP (1080 kHz; 1kw) to 50kw (25kw-CH), utilizing a directional antenna system. On August 14, 1968, the

president of Golden Triangle and Field executed an instrument in the form of a letter offer and acceptance looking toward the acquisition, "subject to FCC approval," of the assets of stations WEEP and WEEP-FM, and the construction permit for increasing the power of WEEP, "as such may appear at the time of closing."[1] Golden Triangle alleges that it never considered this instrument to constitute a contract, and that in November, 1968, it notified Field that its board of directors had decided to discontinue negotiations for the sale of the two stations. Thereafter, Field filed suit in the Court of Common Pleas of Allegheny County (Pennsylvania) seeking specific performance of the August 14, 1968, instrument. A trial was held in January, 1970,[2] but the Court has not yet rendered its judgment. Golden Triangle, meanwhile, has completed construction of the 50kw installation pursuant to the terms of its construction permit (BP-16715), and is seeking a program test authority and a license for these changed facilities.

3. By his pleadings, Field requests that we withhold grant of authority to Golden Triangle to conduct program tests with its new facilities so as to maintain the *status quo* until such time as the Pennsylvania

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1. The instrument, which is made subject to agreement on a formal contract, sets forth specific provisions and terms for the purchase of the stations, and specific provisions in the event of "delivery" or "non-delivery" of the construction permit for increased power.

2. *Joseph M. Field v. Golden Triangle Broadcasting, Inc.*, Ct. C.P. of Allegheny County, Pennsylvania (Case No. 1388).

court renders a decision in the aforementioned action.[3] It is alleged that the instrument of August 14, 1968, provides for the acquisition of WEEP as a 1kw daytime-only facility, together with the construction permit to increase the station's power to 50kw; that once program test authority is granted and WEEP commences operation at 50kw, its former facility "may no longer exist, either legally or physically;" that a grant of program test authority and/or the license application for the 50kw facility may thus so fundamentally alter the subject of the lawsuit as to make it impossible for the Pennsylvania court to grant specific performance of the instrument; and that Golden Triangle constructed the 50kw facility "at its own risk" and with "full knowledge" that Field was seeking equitable relief to have the August 14, 1968, instrument specifically enforced. Golden Triangle replies that the 1kw transmitting facilities of WEEP are to remain intact with the 1kw transmitter to be utilized as an auxiliary transmitter, and that Field's contention that the 1kw facility may no longer exist either legally or physically with WEEP commencing operation at 50kw is without merit; that under the Communications Act and the Commission's rules, Golden Triangle is entitled to program test authority as long as its facilities have been constructed in accordance with the terms of its construction per-

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3. Under section 309 of the Communications Act, license applications are not subject to formal pre-grant objection, and section 1.587 of the Commission's rules makes a similar exception concerning informal objections. We will, nevertheless, consider the matters raised in Field's petition on their merits so as to determine whether a grant of Golden Triangle's request for program test authority and grant of its license application are in the public interest.

mit and an application for license has been filed showing the station to be in satisfactory operating condition; and that it would not be in the public interest to withhold action on Golden Triangle's application until the private controversy between it and Field is resolved.

4. In issuing a construction permit to Golden Triangle to increase the operating power of WEEP to 50kw, a finding was made that the construction of appropriate facilities thereunder and operation of the station with such facilities would serve the public interest, convenience and necessity. Once the permit was issued, Golden Triangle was under an obligation to construct these facilities in a diligent manner,[4] and upon completing construction, was entitled to request, pursuant to section 73.96(a) of the rules, authority to commence program tests with its new operation. Golden Triangle has filed the above-captioned application showing compliance with the requirements of section 73.96(a),[5] and is entitled to a grant of program test authority. The legal controversy between it and Field does not constitute a valid reason for withholding operating authority to this qualified permittee. Furthermore, the issuance of such authority does not super-

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4. Prior to completing construction of its 50kw installation, Golden Triangle sought, and was granted, extensions of its authorized construction period so as to allow time for the resolution of zoning problems and the undertaking of technical studies with respect to its transmitter site.

5. That is, that construction of its 50kw facilities has been completed in accordance with the terms of its construction permit, the technical provisions of the application therefor, the rules and regulations, applicable engineering standards, and that the station is in satisfactory operating condition.

sede an outstanding construction permit and is not to be construed as approval by the Commission of the application for station license.[6] Field's position before the Pennsylvania court is not affected by the grant of this operating authority to Golden Triangle. With respect to action on Golden Triangle's application for license, the controlling statute is section 319(c) of the Communications Act of 1934, as amended. This section provides that the Commission shall issue a license to the lawful holder of a construction permit if it appears that all the terms, conditions and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of the station against the public interest. The controversy between Golden Triangle and Field has no relationship to the public interest finding which was made when the construction permit to increase WEEP's power was granted, and does not constitute changed circumstances which would now make the operation of WEEP at 50kw contrary to the public interest.[7] Thus, we cannot, under section 319(c), withhold grant of Golden Triangle's license application until such time as the pending controversy between it and Field is resolved, irrespective

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6. Section 73.96(e) of the Commission's rules and regulations.

7. Since the operation of WEEP at 50kw was found to be in the public interest when the construction permit therefore was granted, we reject the contention of Field that Golden Triangle must now demonstrate that the population which will receive new service from WEEP is underserved.

of the effect, if any, that such grant may have on Field's position before the Pennsylvania court. We note, however, that final action on Golden Triangle's application would be premature at this time in that it will be required to check, subsequent to the issuance of program test authority, the values of field intensity at various monitoring points for a thirty-day period to demonstrate, to the Commission's satisfaction, the stability of its directional array. Once this procedure is complied with, final action on the application will not be deferred in the absence of a showing, other than that already submitted, that the licensing of WEEP to Golden Triangle at 50kw would be contrary to the public interest.

5. For the foregoing reasons, IT IS ORDERED, That the petition filed on behalf of Joseph M. Field IS DISMISSED; Golden Triangle's request for program test authority IS BEING GRANTED by separate telegram; and action on Golden Triangle's application for license IS BEING WITHHELD pending processing in the manner set forth in paragraph 4.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

APPENDIX G

Constitutional Provisions and Statutes Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States (U. S. Const. Amend. XIV, Section 1) reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Clause 2 of Article VI of the Constitution of the United States (U.S. Const., Art. VI, cl. 2) reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 319(b) of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. §319(b)), reads as follows:

> "Such permit for construction shall show specifi-

cally the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."

Section 151 of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. §151), reads as follows:

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

APPENDIX H

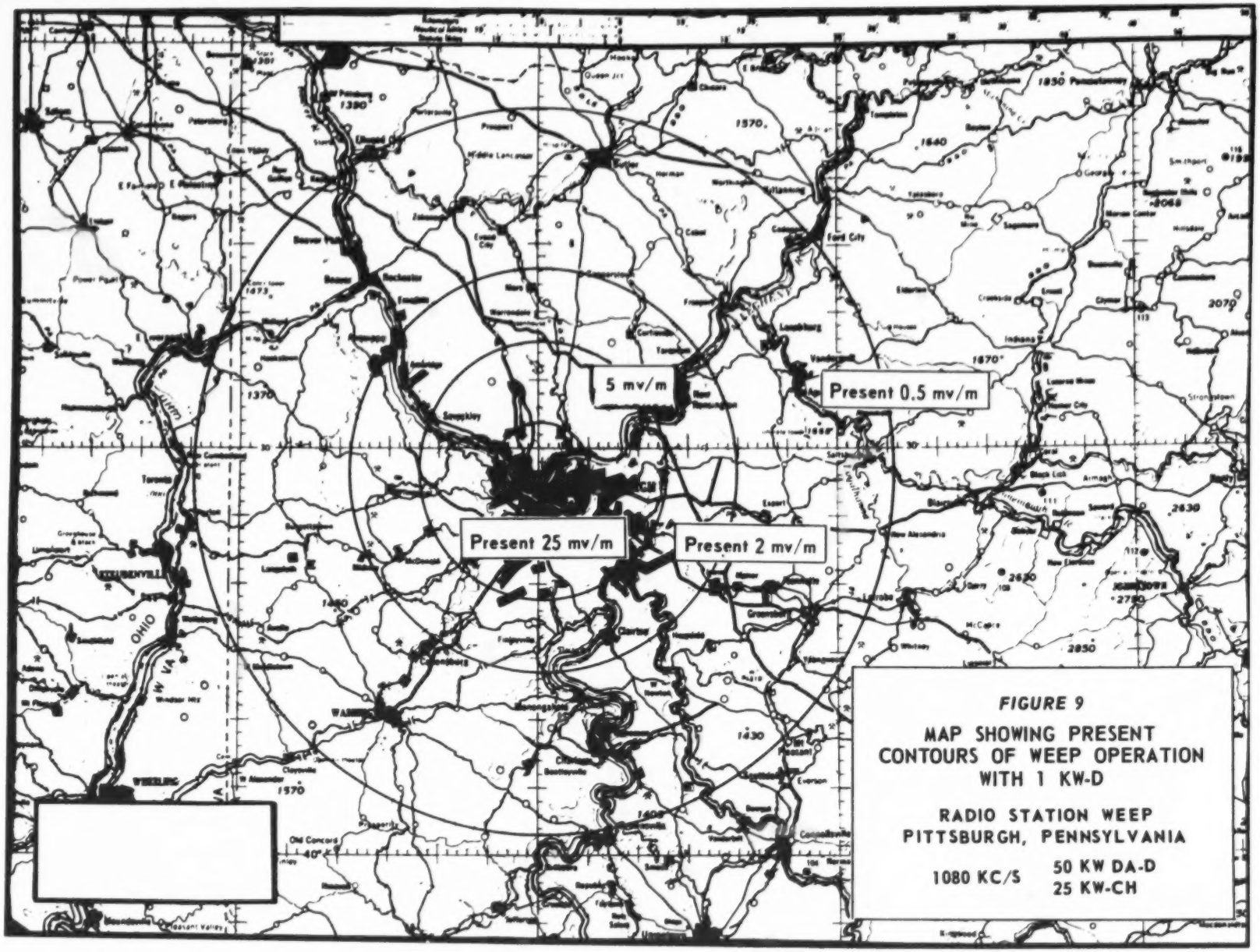

FIGURE 9

MAP SHOWING PRESENT CONTOURS OF WEEP OPERATION WITH 1 KW-D

RADIO STATION WEEP
PITTSBURGH, PENNSYLVANIA

1080 KC/S — 50 KW DA-D, 25 KW-CH

FIGURE 8
MAP SHOWING PROPOSED CONTOURS
RADIO STATION WEEP
PITTSBURGH, PENNSYLVANIA
1080 KC 5
50 KW DA-D
25 KW-CH
WEEP
5 KW
5 mV/m = 50 KW-DA
2 mV/m = 50 KW-DA
0.5 mV/m = 50 KW-DA
25 mV/m = 25 KW-DA
5 mV/m = 25 KW-DA
2 mV/m = 25 KW-DA
0.5 mV/m = 25 KW-DA
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-791.

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner,

v.

JOSEPH M. FIELD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND APPENDICES.

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QUESTION PRESENTED.

Whether the Supreme Court of Pennsylvania has acted properly in modifying a Decree of Specific Performance of an Agreement to sell radio stations to add as a condition to that Decree the requirement that the plaintiff pay for the cost of and defendant transfer a transmitter facility constructed during the pendency of the litigation, where the construction permit and land option for such facility as well as the transmitter itself were to be transferred under the original Agreement and where the Court remands the matter for a hearing on construction costs.

COUNTERSTATEMENT OF THE CASE.

In this equity action, Joseph M. Field ("Respondent") sought and obtained specific performance of an Agreement (Appendix A hereto) with Golden Triangle Broadcasting, Inc. ("Petitioner") for the sale of the assets of two radio stations, WEEP-AM and WEEP-FM, Pittsburgh, Pennsylvania, subject to Federal Communications Commission ("FCC") approval. Only the Decree with respect to the AM station is at issue here.

At the time the Agreement was made on August 14, 1968, the AM station was licensed to operate with 1,000 watts (1 kw) of power, but Petitioner had received from the FCC a construction permit to increase the power to 50,000 (50 kw). It also owned a 50 kw transmitter and an option to acquire a transmitter site for construction of a 50 kw facility. The Agreement required Petitioner at closing to deliver the AM and FM stations as then licensed and to use its best efforts to deliver the 50 kw construction permit to Respondent, together with the 50 kw transmitter and the site option.

Petitioner attempted to repudiate the Agreement on October 31, 1968, and this action was commenced on November 6, 1968. Trial was held in January, 1970, at which time Petitioner made no attempt to show it had used its best efforts to retain the construction permit. Rather, it offered testimony showing that it was in the process of and had made substantial expenditures in constructing the 50 kw facility (constructing a transmitter building, broadcast towers, exercising the site option) and argued that such construction expenditures made specific performance at the contract price inequitable. Respondent contended that Petitioner could have applied for and obtained an extension of the construction permit, that it was not obliged to

have made such expenditures, and that its own acts during pendency of the litigation could neither impose an additional financial obligation on Respondent nor defeat specific performance. At that time, construction was not yet complete, the 50 kw facility was not yet licensed by the FCC and, therefore, specific performance of the sale of the station as a 1 kw facility was still possible. The lower court granted specific performance of the sale of the station as a 1 kw facility.

Prior to its appeal to the Supreme Court of Pennsylvania, Petitioner had sought and obtained from the FCC a modification of its AM license from 1 kw to 50 kw. In its brief on appeal, Petitioner again raised the issue of the 50 kw facility as a basis for defeating specific performance, then claiming that the modification of the license to 50 kw subsequent to trial made specific performance as a 1 kw facility, as decreed by the lower court, an impossibility. (See Appendix B hereto, Petitioner's Appeal brief pp. 64-65).

Argument before the Supreme Court was held on September 28, 1972. Petitioner again strenuously contended that the modification of the license to 50 kw subsequent to trial made specific performance as a 1 kw facility impossible and that it had been obligated so to construct. Respondent answered that if the license modification made specific performance of the sale of the station as a 1 kw facility impossible, the Supreme Court should modify the Decree to provide for specific performance of the sale of the station as a 50 kw facility, and that if the Court concluded that Petitioner had not acted willfully, it could condition its Decree on reimbursement to Petitioner of its costs of constructing the 50 kw facility. Respondent analogized this situation to cases where during litigation to compel specific performance of realty agreements, improve-

ments such as sewers were made and assessments levied pursuant to legally mandated authority, and where appellate courts have conditioned specific performance decrees on payment for the assessments for such improvements. (Respondent's post-argument letter citation of such authorities to the Pennsylvania Supreme Court is attached hereto as Appendix C.)

The Supreme Court of Pennsylvania modified the lower court's decree of specific performance to require conveyance of the station as a 50 kw facility upon reimbursement to Petitioner of its costs of constructing the 50 kw facility, and remanded for a hearing on such costs (Petition for Certiorari, Appendix A, pp. 17a-18a).

ARGUMENT.

The basic issue in the instant case was whether, under Pennsylvania law, Petitioner had entered into an agreement to sell its two radio stations. The Pennsylvania Courts found that Petitioner had so agreed, that it had breached its agreement, and was required specifically to perform it. In its appeal from the lower court's grant of a specific performance decree, Petitioner raised the fact that events had occurred during the pendency of the litigation from which it contended that specific performance was impossible. The Supreme Court of Pennsylvania took cognizance of the facts Petitioner raised, and modified the lower court's Decree to do equity to Petitioner while providing equity to Respondent. Far from being injured by the Pennsylvania Supreme Court's action, Petitioner benefited by being granted reimbursement for costs it had expended on the AM station during the litigation. In any event, none of these questions involve federal matters worthy of consideration by this Court.

I. The Pennsylvania Supreme Court Properly Exercised Its Equitable Powers in Granting Specific Performance and Modifying the Decree to Accommodate Intervening Circumstances.

It is beyond question that state courts of equity have the power to decree specific performance of agreements. It is equally clear that state courts, lower and appellate, have the power to modify such decrees to take cognizance of changed circumstances and thereby do equity to both parties. See, e.g., *King v. Raab*, 123 Iowa 632, 99 N. W. 306 (1904), where the court stated that equity has often recognized "the right to impose conditions where there has been a change of circumstances for which neither party

can be blamed." (99 N. W. at p. 307). When the Pennsylvania Supreme Court modified the Decree to require transfer of the 50 kw facility, it was simply applying the Agreement to changed circumstances.

The crucial fact is that the Agreement specifically covered the (then prospective) 50 kw facility, and provided for its transfer, in embryo form, to Respondent. When the Agreement was executed, Petitioner owned a construction permit (allowing construction of a 50 kw facility), an option on a site for the building and towers, and a transmitter. The Agreement expressly required Petitioner to transfer the construction permit and option to Respondent and to sell him the transmitter (Agreement, Appendix A hereto, paragraphs 5-7). Petitioner was also required to use its best efforts to keep the construction permit in effect until closing, but if it could not, the sale was still to be made with a price reduction. (*Id.*)

Petitioner has attempted to imply that the 50 kw facility was something not in the contemplation of the parties, but that is not the case. Had Petitioner not breached its Agreement with Respondent, Respondent would have received the construction permit, site option and transmitter at closing, and Respondent would have constructed (or decided not to construct) the 50 kw facility at his or his transferee's cost. Petitioner has also attempted to pretend that the 50 kw facility is separate from the AM station or its Agreement with Respondent, as if it had an independent existence. That is not so. The 50 kw facility is simply a later manifestation of the rights Petitioner had—and agreed to sell Respondent—in 1968. It is true that in 1968 Petitioner could have sold Respondent the AM station without the construction permit, and that in 1973 it would be difficult if not impossible to sell that station without the 50 kw facility which is now

part of its license. But that is a result of Petitioner's breach of its Agreement with Respondent and its post-breach (and post-litigation) activity. The Pennsylvania Supreme Court appropriately applied the Agreement to these changed circumstances.

Furthermore, there is no factual basis for Respondent's contention that it was never heard by the Pennsylvania courts on the 50 kw facility. Even at the 1970 trial, Respondent adduced testimony indicating that it was in the process of constructing the towers and buildings for a 50 kw facility, and it argued that these expenditures made specific performance inequitable. Since Petitioner made no showing that it had used its best (or any) efforts to keep the construction permit in effect, and since the AM license at that time was for a 1 kw facility, the lower court simply ignored that construction. However, at the time the appeal was argued, Petitioner had obtained the modification of the AM license from 1 kw to 50 kw. Again, it was Petitioner which raised these facts fully before the Pennsylvania Supreme Court, arguing that specific performance was now impossible. That Supreme Court accepted Petitioner's argument, but since Respondent had been entitled to the 50 kw facility under the agreement, it modified the Decree to provide for the transfer of the stations and the 50 kw facility, but required Respondent to pay the costs of that construction. Further, it remanded for a full hearing on such costs.

It is nonsense for Petitioner to say that it was denied the opportunity to be heard or due process of law regarding facts which it itself placed before the court as the basis for its arguments. Petitioner's real complaint is that the Pennsylvania Supreme Court took cognizance of the facts Petitioner placed before it, but then applied a remedy it deemed equitable instead of the inequitable result for which Petitioner contended.

Similarly, there is no merit whatsoever to Petitioner's complaint that the Supreme Court ordered that it be reimbursed only its costs of construction. Again, it must be emphasized that Petitioner breached an Agreement under which it was required to sell to Respondent the elements of a 50 kw facility in embryonic form, so that the value of such a facility was encompassed by the purchase price specified in the Agreement of Sale.

The 50 kw facility consists of three elements: the license, the site and the tangible improvements. Since the purchase price specified in the Agreement included the value of the right to obtain the 50 kw license (embodied in the construction permit) and the value of the right to obtain the 50 kw site (at the price embodied in the option), any appreciation in these items was clearly to be for Respondent's benefit. Therefore, the only items for which Petitioner can properly claim reimbursement are the costs actually expended to buy the site pursuant to exercise of the option and the costs of the tangible improvements at the site (the transmitter building, towers and associated electronic equipment).

As the Pennsylvania Supreme Court noted in its Opinion [Petition for Certiorari, Appendix A, p. 17a, n. 10]:

> Whether a seller should be allowed to be reimbursed for improvements made by him to the property depends upon the equity of the particular situation.

In applying this generally accepted principle, court decrees have varied from refusing to allow any reimbursement, *Coppom v. Humphreys*, 171 Colo. 410, 467 P. 2d 816 (1970), to allowing the increase in value, *Fitzpatrick v. Allied Contracting Company*, 24 Ill. 2d 448, 182 N. E. 2d 183 (1962), depending on the circumstances. However, the majority of cases have conditioned specific performance on reimbursement of the actual cost of an improvement. *See, e.g., Nelson*

v. Robinson, 189 Iowa 1076, 178 N. W. 416 (1920); *Fontaine v. Brown County Motors Co.,* 251 Wis. 433, 29 N. W. 2d 744 (1947) (increased value but not to exceed actual cost); Annot., 7 A. L. R. 2d 1205 § 18. In Pennsylvania, the decision of *Phillips v. Coast,* 130 Pa. 572 (1890), in a similar situation, points to the same result. In *Phillips,* defendants had drilled oil wells mistakenly believing they were lessees. It was held that defendants were entitled to a set-off for the actual cost of drilling the wells.

Thus, the Supreme Court's modification of the specific performance Decree provides Petitioner with all the reimbursement to which it is entitled. Petitioner complains that the Supreme Court described its action in constructing the 50 kw facility as "unilateral" and "questionable." The actions were clearly unilateral. Furthermore, Petitioner's failure to make any showing either in the lower court or on appeal that it had used its best (or any) effort to obtain an extension of the construction permit justifies characterization of its actions as "questionable". Nevertheless, it is clear that the Supreme Court accepted Petitioner's contention that it had not acted culpably, for if the Court had found willfulness, it would have been justified in providing no reimbursement to Petitioner. Thus, in *Schiavone v. Ashton,* 269 Ill. App. 386 (1933), while a cross-claim for specific performance was pending, the owner built a brick building on the property. Despite the fact that earlier lower court decisions had found for the owner, the appellate court in approving specific performance found that the owner had unlawfully repudiated the contract of sale and was, therefore, not entitled to any reimbursement for the cost of constructing the building. In fact, the Pennsylvania Supreme Court's modification of the instant Decree requires Respondent not to challenge the costs incurred by Petitioner. Thus, in practical effect, Respondent has been deprived of the opportunity to construct

the 50 kw facility at his own cost which he would have had but for the improper refusal of Petitioner to perform its Agreement of Sale. The Petitioner can hardly be heard to complain because the Pennsylvania Supreme Court has attempted to treat both parties fairly and equitably.

II. There Is No Conflict Between the State Court's Specific Performance Decree and the Federal Communications Act.

Petitioner has attempted to fabricate a "conflict" between the Decree of Specific Performance and the Federal Communications Act. This argument is without merit, for there is no connection whatsoever between the two in fact or in law. The state court decision enforces the Pennsylvania law of contracts. The transfer contemplated in that contract is subject to FCC approval, and when application is made to it, the FCC will effect the policy of the Communications Act.

Furthermore, Petitioner's contention that the Pennsylvania Supreme Court's modification requiring it to transfer the 50 kw facility on reimbursement of its costs of construction is a "penalty" defies reality. As indicated above, but for Petitioner's violation of its Agreement of Sale, it would not have been in the position to incur construction costs, and since the original sale price encompassed the value of the prospective 50 kw facility, all it could equitably obtain was reimbursement of costs. Thus, reimbursement is not a penalty but Petitioner's maximum equitable adjustment. Nor can Petitioner fully contend that it was obliged to construct the facility, for it concedes that the permit could have lapsed (Petition for Certiorari, p. 22) and had that happened, Petitioner's sales agreement with Respondent would still have been effective.

Finally, even if the Specific Performance Decree could be considered a penalty, this Court held in *Regents of*

Georgia v. Carroll, 338 U. S. 586, 70 S. Ct. 370, 94 L. ed. 363 (1950) that such a state court judgment was not inconsistent with the Communications Act of 1934. In *Carroll,* the FCC, before renewing a radio license, required the Regents to repudiate an agreement under which the Regents had purchased stock of a company which had formerly operated the radio station for the Regents. The FCC deemed the stock purchase agreement the continuation in an altered form of an arrangement it had theretofore held to violate the Communications Act. The other party to the stock purchase agreement sued in a Georgia court on the stock purchase agreement, and was awarded damages. This Court noted that the damage action constituted no direct challenge to the ruling of the FCC regarding the legality of the prior arrangement. It deemed the issue to be whether the Communications Act and the Constitution prevented a state from entering a judgment giving recovery on "the very stock purchase contract that justified the Commission's refusal of a license." 338 U. S. at p. 596. Against the argument that the state court judgment thwarted the FCC's enforcement of the requirements of the Act, this Court affirmed the Georgia judgment, holding that the FCC's order could not affect the validity of a contract. If the state court judgment in *Carroll* did not conflict with the Communications Act, *a fortiori,* the Pennsylvania Supreme Court's Decree of Specific Performance could not be deemed to do so.

CONCLUSION.

The Pennsylvania Supreme Court properly found that Petitioner had violated its Agreement with Respondent and properly modified the lower court's Decree of Specific Performance to do equity to both parties considering the change in circumstances during litigation. Petitioner itself raised and based arguments before the Pennsylvania Supreme Court on these changes in circumstances. It cannot now claim it was not heard when in fact it was, and its real complaint is that it argued for one result based on the changed circumstances and the Pennsylvania Supreme Court reached a different and more equitable result taking those circumstances into account. All of these matters are considerations of state law and raise no questions of concern to this Court. Finally, there is no conflict whatsoever between the Decree of Specific Performance and the Communications Act of 1934.

For the foregoing reasons, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT G. KEENE, JR.,
Attorney for Respondent.

August 14, 1968

Blackburn & Co., Inc.
1725 K St. N.W.
Washington, D. C. 22036

Gentlemen:

Subject to agreement on a formal contract containing the provisions hereinafter set forth, and subject to FCC approval, we hereby offer to purchase the assets of Radio Stations WEEP and WEEP-FM, Pittsburgh, Pa., on the following terms and conditions:

1. We will pay a total purchase price of $650,000, as follows:

(a) We will pay $175,000 cash at closing. Of this amount, ~~$50,000~~ $25,000 will be placed in escrow at the time of signing a formal contract, with the balance of ~~$125,000~~ $150,000 to be paid at closing. In the event of Buyer's default, liquidated damages shall be ~~$50,000~~ $25,000.

(b) The balance of the purchase price of $475,000 will be paid as follows:

No payments of principal or interest during the first six months.

Four quarterly principal payments of $12,000 each commencing ~~six~~ nine months after closing.

Four quarterly principal payments of $18,000 each commencing ~~18~~ 21 months after closing.

Twelve quarterly principal payments of $29,583.33 each commencing ~~30~~ 33 months after closing.

Said installment obligation of $475,000 will be evidenced by a note of Buyer to Seller setting forth the above schedule of payments and providing for payment of interest at the rate of 6% per annum computed on the unpaid balance from time to time remaining, with interest to be paid on said unpaid balance concurrently with each payment of principal.

Said note will be secured by a mortgage on all of the assets delivered. If a new corporation is formed for the purpose of completing this purchase, all of the stock in said new corporation shall be pledged as additional security for said note. If an existing corporation becomes the Buyer and if its stock cannot be so pledged, Seller shall have the right to examine such buying corporation's balance sheet prior to execution of a formal contract and, if such balance sheet is not satisfactory to him, shall then have the right to void this entire transaction.

APPENDIX A

A1

Buyer reserves the right to prepay said installment note, in whole or in part, at any time without penalty.

2. It is understood and agreed that all of the assets of said radio stations, except for the land at the present transmitter site and cash and accounts receivable, are to be delivered free and clear of any and all liens and encumbrances. An inventory of the assets to be delivered will be prepared and will become a part of the formal contract.

3. Seller agrees to lease the present transmitter site to Buyer at a rental of $100 per month for a period of 10 years after closing with an option to Buyer to renew for another 10-year period at a rental of $250 per month. Said rentals shall be net to the Lessor; that is, Lessee shall pay all taxes, insurance and upkeep costs on said property. Seller shall also grant Buyer the right of first refusal on any sale of said property. Buyer shall have the right to cancel such lease at any time on 90 days' notice.

4. Seller will be responsible for accounts payable and will also retain accounts receivable, except that Buyer will collect said accounts receivable for a period of 90 days after closing, after which Buyer will turn over to Seller all monies collected and all uncollected accounts.

5. In addition to the assets previously referred to, Seller will also deliver to Buyer all his right, title and interest in an FCC Construction Permit for increasing the power of Radio Station WEEP to 50,000 watts, as such may appear at the time of closing. Between now and the time of closing, Seller agrees to use his best efforts to keep such 50 kw C.P. in full force and effect and in good standing. If, however, at the time of final closing Seller is unable for any reason to deliver to Buyer such 50 kw C.P., there shall then be a reduction in the total purchase price of $25,000, this being the approximate amount of Seller's present investment in said C.P. Such reduction shall be reflected in the cash downpayment which, under such conditions, would be reduced to $150,000.

6. In the event that such 50 kw. C. P. is delivered to Buyer at closing, Buyer then agrees to purchase from Seller the 50 kw. transmitter now owned by Seller for the sum of $25,000, ~~cash.~~ on terms of $10,000 cash down and three annual payments of $5,000 each plus 6% interest. If such 50 kw C.P. is not delivered to Buyer, Buyer shall have no obligation to purchase said transmitter.

7. Seller will also deliver to Buyer the option to lease and/or purchase the new transmitter site for the 50 kw. installation for $45,000.

In any event, Buyer's obligation to purchase shall be conditioned on prior inspection and approval of transmitter by Buyer's engineer.

8. Buyer agrees to assume all of the contractual obligations of said stations which are usual and normal to its operation, such as a studio-office lease, music licensing agreements, news service contracts, and the like, provided however that all such agreements to be assumed are first made available to Buyer for inspection and approval. A list of all such contracts to be assumed will be prepared and will become a part of the formal contract.

9. Both parties recognize Blackburn & Co., Inc. as exclusive broker in this transaction. Seller will pay the brokerage commission due to Blackburn & Co., Inc. in connection with this transaction and will hold Buyer harmless from any obligation for such commission to Blackburn & Co., Inc.

As evidence of our good faith, we attach herewith our check in the amount of $10,000 made payable to Blackburn & Co., Inc. If this offer is accepted and a formal contract is agreed to, this amount will become a part of the escrow payment mentioned above. If this offer is not accepted or if a formal contract is not agreed to, this check will be returned to us without any obligation.

It is understood that the undersigned is making this offer on behalf of a corporation, either in existence or to be formed, in which he is or will be a stockholder, and that the undersigned has the right to assign all of his rights and obligations under this offer to such corporation.

If this offer is accepted, both parties agree to immediately proceed with the preparation of a formal contract containing the terms and provisions of this letter as well as with the preparation and execution of all necessary applications for filing with the FCC for effecting this proposed transfer.

It is further understood and agreed that for purposes of contract allocation, the total purchase price of $650,000 will be divided approximately as follows:

WEEP AM	$400,000
WEEP FM	225,000
50 kw C.P.	25,000.

Joseph M. Field

Accepted:

GOLDEN TRIANGLE BROADCASTING INC.

By _____
President

Received check for $10,000:

Blackburn & Co., Inc.

_____

APPENDIX A

APPENDIX B.

Excerpt From Petitioner's Brief on Appeal.

Thus, as specifically found by the Commission, once the construction permit was issued, defendant was *obligated* to proceed with the diligent construction of the new 50 kilowatt facility. Accordingly, by reason of its compliance with FCC requirements and directives, it was blatantly unfair and improper for defendant to have been precluded in the instant proceeding from proving the consequences of such action and the changed circumstances that exist as a result.

As also noted in the FCC's opinion and order, with the operation of the new 50 kilowatt facility, the former 1 kilowatt facility is utilized only as an auxiliary transmittter. In other words, the 50 kilowatt facility is now the primary broadcast facility and the 1 kilowatt facility is used only in a secondary capacity in the periods of not more than ½ hour before sunrise in Pittsburgh according to the season or temporarily in the event of a breakdown of the 50 kilowatt transmitter.

Under these circumstances, the lower court's decree of specific performance places the parties in an impossible situation that manifestly was not contemplated when the August 14, 1968 letter was signed. An affirmance of that decree would result in a division of the two facilities and the licenses to operate them, which would leave defendant without an auxiliary transmitter and would give plaintiff an auxiliary transmitter for 50 kilowatt facility which he would not own. Moreover, under FCC rules, the two facilities could not be operated independently since two transmitters cannot broadcast on the same frequency in the same area.

As previously mentioned, defendant acted properly in constructing the 50 kilowatt facility and in accordance with

FCC directives. Neither the defendant's ownership of that facility or its right to operate it are in dispute. Thus, the issue is limited to a proper determination of the rights with respect to the 1 kilowatt facility.

Under these circumstances, and for all of the reasons discussed above, we respectfully submit that the remedy of specific performance is wholly improper and inappropriate in this case. Not only is the alleged contract not sufficiently clear and complete as to be capable of being specifically enforced, but the use of such a remedy, by reason of the changed conditions that now exist, would place the parties in an impossible position. Accordingly, we respectfully submit that if plaintiff is entitled to any remedy at all, which defendant strenuously denies, such remedy should be limited to a remedy at law for damages.

Conclusion.

The decree granting specific performance should be reversed. A decree should be entered in favor of defendant. Alternatively, the action should be remanded for hearing on the issue of damages for breach of contract.

Respectfully submitted,

JOHN A. METZ, JR.,
METZ, COOK, HANNA & KELLY,
Attorneys for Appellant.

APPENDIX C.

Mr. Chief Justice Benjamin R. Jones
Supreme Court of Pennsylvania
4th Floor, City Hall
Philadelphia, Pennsylvania

September 29, 1972

Re: Field v. Golden Triangle Broadcasting, Inc.
Case No. 100, March Term 1972

Dear Mr. Chief Justice Jones:

At the September 28, 1972 argument in the above appeal, time restrictions prevented me from citing to the Court several cases in which equity courts had modified or conditioned decrees to recognize changed circumstances and avoid hardship. By this letter, I would like to place those authorities before the Court.

I did cite *Fitzpatrick v. Allied Contracting Company*, 24 Ill. 2d 448, 182 N. E. 2d 183 (1962), where specific performance was conditioned on payment for land improvements made between an option's grant and its exercise.

In addition, in *Nelson v. Robinson*, 189 Iowa 1076, 178 N. W. 416 (1920), plaintiff leased with option to buy at a specified price. Thereafter, paving assessments were imposed on the landowner. The Court conditioned specific performance of the option on the purchaser's acceptance of the land subject to assessments. In a factually identical situation, in *King v. Raab*, 123 Iowa 632, 99 N. W. 306 (1904), the Court affirmed the lower court's decree which conditioned specific performance on plaintiff's reimbursing

defendant for the amount paid for assessments and assuming the unpaid assessments.

Yours sincerely,

S. Gordon Elkins, Attorney for
Appellee, Joseph M. Field

cc: Hon. Michael J. Eagen
Hon. Henry X. O'Brien
Hon. Samuel J. Roberts
Hon. Thomas W. Pomeroy, Jr.
Hon. Robert N. C. Nix, Jr.
Hon. Louis L. Manderino

John A. Metz, Jr., Esquire

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner

v.

JOSEPH M. FIELD,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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IN THE

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OCTOBER TERM, 1973

NO. 73-791

GOLDEN TRIANGLE BROADCASTING, INC.,
Petitioner

v.

JOSEPH M. FIELD,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Respondent has first raised, in its Brief in Opposition to the instant Petition for a Writ of Certiorari, the argument that the Supreme Court of Pennsylvania was justified in ordering transfer of Petitioner's 50,000 watt facility to Respondent because of "intervening" or "changed" circumstances related to the said 50,000 watt facility. Respondent bases this argument on a contention that these "intervening" or "changed" circumstances were litigated below. Petitioner believes that Respondent's new argument completely distorts the facts and the record below and accordingly files this Reply to Respondent's Brief.

Reply to Respondent's Brief.

As pointed out in the Petition for a Writ of Certiorari, both parties and the trial court agreed during trial, and the parties agreed on appeal, that the ownership of the 50,000 watt facility, and any rights with respect thereto, were not in issue in this case (Petition, pages 5-7). Significantly, Respondent's Brief does not deny these facts.

Rather, Respondent's Brief argues that Petitioner did have a hearing with reference to the 50,000 watt facility. This argument is based on complete distortions of the facts relating to (1) the exclusion of evidence at trial, upon objection by Respondent, concerning the 50,000 watt facility, which had been offered by Petitioner to show that specific performance of the contract relating to the 1,000 watt facility would be inequitable, and, (2) Petitioner's argument on appeal that the exclusion of such evidence constituted error.

For example, at page 2 of its Brief, Respondent states that Petitioner (1) offered testimony regarding its construction of the 50,000 watt facility and (2) argued that that construction made specific performance of the contract regarding the 1,000 watt facility inequitable. To that extent Respondent is correct, but Respondent fails to point out that the trial court sustained Respondent's objection that such testimony was "totally irrelevant" and no such testimony or evidence was admitted or considered, therefore, by the trial court to any extent. (R. 337a-349a)[1].

Similarly, at page 7 of its Brief, Respondent again states that Petitioner "adduced" testimony regarding

---

1. "R" refers to the printed Record filed in the Supreme Court of Pennsylvania.

the construction of the 50,000 watt facility at trial with regard to its equitable effect, and then states that the trial court "simply ignored that construction". Respondent obviously intends to imply that the trial court ignored the construction of the 50,000 watt facility after a hearing, since the first sentence of that same paragraph reads: "Furthermore, there is no factual basis for Respondent's [sic][2] contention that it was never heard by the Pennsylvania courts on the 50KW facility." Again, the trial court did not "ignore" evidence which that court received *but, rather, expressly excluded that evidence from introduction or consideration upon Respondent's objection that the 50,000 watt facility was not involved in the proceeding.* (R. 337a-349a).

Respondent further attempts to argue that a hearing with reference to the 50,000 watt facility was had before the Supreme Court of Pennsylvania on appeal, expressly stating that Petitioner raised the "issue" or "facts" regarding the 50,000 watt facility (Respondent's Brief, pages 3, 5 and 7) before that court. As its sole support for this argument, Respondent refers to pages 64 and 65 of Petitioner's Appeal Brief (Respondent's Brief, App. B.).

On that basis, Respondent would have this Honorable Court believe that Petitioner had a hearing on the issues with reference to the 50,000 watt facility. In fact, Petitioner's argument to the Supreme Court of Pennsylvania was that *the exclusion of evidence* regarding the 50,000 watt facility by the trial court *was in error* because it would have been, and was, relevant to the

---

2. Obviously should read "Petitioner's".

question of the appropriateness of the remedy of specific performance of the contract relating to the 1,000 watt facility (see pages 61 through 65 of the Petitioner's Brief on Appeal, Appendix "I" hereto). The making of such an argument on appeal obviously neither places the rights of the parties with reference to the 50,000 watt facility at issue nor constitutes a hearing on those rights. *Rather, the facts are that the parties agreed, both at trial and on appeal, and the trial court so held, that the rights of the parties with reference to the 50,000 watt facility were not in issue in this case.*

The remainder of Respondent's Brief argues that the decision of the Supreme Court of Pennsylvania with regard to the 50,000 watt facility was proper and makes reference to numerous alleged facts regarding the 50,000 watt facility and its construction. Respondent, however, nowhere makes reference to any evidence or portions of the record below where those facts (or "intervening" or "changed" circumstances as Respondent describes them) were introduced into evidence or were litigated, other than by the misleading implications discussed above. The reason for this omission is obvious — Petitioner has never had a hearing on the question of its rights with reference to the 50,000 watt facility, or the

price, or the circumstances surrounding the construction of the 50,000 watt facility, and, therefore, has been deprived of its property without due process of law.

Respectfully Submitted,

CLOYD R. MELLOTT, ESQ.
C. ARTHUR WILSON, JR., ESQ.
DAVID B. WARD, ESQ.
ECKERT, SEAMANS, CHERIN & MELLOTT

and

JOHN H. MIDLEN
JOHN H. MIDLEN, JR.
MIDLEN & REDDY
Attorneys for Petitioner

APPENDIX I

Excerpt from Petitioner's Brief on Appeal to the Supreme Court of Pennsylvania

A further reason why the remedy of specific performance is wholly inappropriate in this case is that the granting of such remedy places the parties in an impossible position that clearly was not contemplated when the August 14, 1968 letter was signed.

The letter of August 14, 1968 specifically referred to the transfer of Seller's FCC construction Permit to increase the power of WEEP Radio Station to 50,000 watts and the option to purchase or lease a new 50 kilowatt transmitter site. Subsequently, during the pendency of this litigation, defendant obtained extension of the construction permit and proceeded to construct the facility itself (337a-338a). During the trial, defendant offered to prove the substantial expense it had incurred in such construction, which offer was rejected by the Trial Judge (Offer Exhibit "1"; 397a-399a; 338a-349a). Thereafter, upon the plaintiff's stipulation that the new facility was not covered by the August 14, 1968 letter and that he did not want that facility, the lower court specifically excluded the new 50 kilowatt facility from its decree but nevertheless granted specific performance with respect to the previously existing 1 kilowatt facility

We submit that the ruling of the Trial Judge which excluded defendant's offer of proof with respect to the 50 kilowatt facility as well as the subsequent grant of specific performance as to the 1 kilowatt facility constituted patent error. It is abundantly clear that specific performance cannot be granted as to the 50 kilowatt facility not in existence on August 14, 1968. Everyone

concerned, including the plaintiff and the Trial Judge, were in complete agreement on this point. However, for the lower court nevertheless to grant specific performance as to the 1 kiolwatt facility, without accepting evidence as to the status of the 50 kilowatt facility and the changed conditions that exist because of its construction, constituted a refusal by the Court to consider the effect of its decree and was highly improper.

In so proceeding, the lower court based its ruling on the ground that defendant could not defeat the plaintiff's claim for specific performance by having voluntarily engaged in subsequent conduct which rendered the alleged contract incapable of performance. However, the construction of the 50 kilowatt facility by defendant was not in any way improper or devious but rather was done in the ordinary course of business and, and directives. This was made abundantly clear by the more importantly, in accordance with FCC regulations Commission itself in a Memorandum Opinion and Order adopted October 21, 1970, released October 28, 1970, in a proceeding captioned *"In re* Application of Golden Triangle Broadcasting, Inc., Radio Station WEEP, Pittsburgh, Pennsylvania, for license to cover construction permit for changed facilities and request for program test authority", docketed at File No. BL-12753.* In that opinion and order, the Commission approved defendant's request to conduct program test authority for its new 50 kilowatt facility preliminary to the final issuance of a license to operate the facility.

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*This Memorandum Opinion and Order, which is a matter of public record, is reproduced at the end of this brief for the convenience of the Court as an Appendix.

Appendix I.

As noted by the Commission in its opinion, plaintiff opposed the issuance of such authority to defendant on the ground that this litigation was pending and the commencement of operation of the 50 kilowatt facility may mean that the former facility, *i.e.,* the 1 kilowatt facility, may no longer exist "either legally or physically". The Commission rejected the plainttiff's position as being "without merit" and, in doing so, made the following highly significant statements (at pp. 2-3):

> "In issuing a construction permit to Golden Triangle to increase the operating power of WEEP to 50 kw, a finding was made that the construction of appropriate facilities thereunder and operation of the station with such facilities would serve the public interest, convenience and necessity. *Once the permit was issued, Golden Triangle was under an obligation to construct these facilities in a diligent manner,* and upon completing construction, was entitled to request, pursuant to section 73.96(a) of the rules, authority to commence program tests with its new operation."

Thus, as specifically found by the Commission, once the construction permit was issued, defendant was *obligated* to proceed with the diligent construction of the new 50 kilowatt facility. Accordingly, by reason of its compliance with FCC requirements and directives, it was blatantly unfair and improper for defendant to have been precluded in the instant proceeding from proving the consequences of such action and the changed circumstances that exist as a result.

As also noted in the FCC's opinion and order, with the operation of the new 50 kilowatt facility, the former

1 kilowatt facility is utilized only as an auxiliary transmitter. In other words, the 50 kilowatt facility is now the primary broadcast facility and the 1 kilowatt facility is used only in a secondary capacity in the periods of not more than ½ hour before sunrise in Pittsburgh according to the season or temporarily in the event of a breakdown of the 50 kilowatt transmitter.

Under these circumstances, the lower court's decree of specific performance places the parties in an impossible situation that manifestly was not contemplated when the August 14, 1968 letter was signed. An affirmance of that decree would result in a division of the two facilities and the licenses to operate them, which would leave defendant without an auxiliary transmitter and would give plaintiff an auxiliary transmitter for 50 kilowatt facility which he would not own. Moreover, under FCC rules, the two facilities could not be operated independently since two transmitters cannot broadcast on the same frequency in the same area.

As previously mentioned, defendant acted properly in constructing the 50 kilowatt facility and in accordance with FCC directives. Neither the defendant's ownership of that facility or its right to operate it are in dispute. Thus, the issue is limited to a proper determination of the rights with respect to the 1 kilowatt facility.

Under these circumstances, and for all of the reasons discussed above, we respectfully submit that the remedy of specific performance is wholly improper and inappropriate in this case. Not only is the alleged contract not sufficiently clear and complete as to be capable of being specifically enforced, but the use of such a

remedy, by reason of the changed conditions that now exist, would place the parties in an impossible position. Accordingly, we respectfully submit that if plaintiff is entitled to any remedy at all, which defendant strenuously denies, such remedy should be limited to a remedy at law for damages.

Conclusion.

The decree granting specific performance should be reversed. A decree should be entered in favor of defendant. Alternatively, the action should be remanded for hearing on the issue of damages for breach of contract.

Respectfully submitted,

JOHN A. METZ, JR.,
METZ, COOK, HANNA & KELLY,
Attorneys for Appellant.